S. Hrg. 98-1142

SPARE PARTS LEGISLATION

HEARING

BEFORE THE

TASK FORCE ON SELECTED DEFENSE PROCUREMENT MATTERS

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 2489

TO AMEND THE SMALL BUSINESS ACT TO ENHANCE COMPETITION IN GOVERNMENT PROCUREMENT

S. 2571

TO AMEND TITLE 10, UNITED STATES CODE, TO IMPROVE THE PROCEDURES FOR PROCUREMENT OF TECHNICAL DATA AND SPARE PARTS BY THE DEPARTMENT OF DEFENSE, AND FOR OTHER PURPOSES

S. 2572

TO AMEND TITLE 10, UNITED STATES CODE, TO PROVIDE FOR MORE COST EFFECTIVE AND EFFICIENT PURCHASES OF SPARE PARTS BY THE DEPARTMENT OF DEFENSE, AND FOR OTHER PURPOSES

MAY 16, 1984

Printed for the use of the Committee on Armed Services

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SPARE PARTS LEGISLATION

WEDNESDAY, MAY 16, 1984

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
TASK FORCE ON SELECTED DEFENSE PROCUREMENT MATTERS,
Washington, DC.

The task force met, pursuant to notice, at 10:10 a.m., in room SR-222, Russell Senate Office Building, Senator Dan Quayle (chairman of the task force) presiding.

Present: Senators Quayle, Levin, and Dixon.

Staff present: Alan R. Yuspeh, general counsel; Jeffrey H. Smith, minority counsel; and Marie Chaillet, staff assistant.

Also present: Jon Etherton, assistant to Senator Jepsen; Bernard R. Toon, assistant to Senator Quayle; Jim Morhard, assistant to Senator Wilson; Michael A. Feinberg, assistant to Senator Bingaman: Charles C. Smith, assistant to Senator Dixon; Jeff Minsky and Ralph White, Governmental Affairs; and Alan Chvotkin; and Bill Montalto, Small Business Committee.

OPENING STATEMENT BY SENATOR DAN QUAYLE, CHAIRMAN

Senator QUAYLE. The committee will come to order.

The Ad Hoc Task Force on Selected Defense Procurement Matters of the Committee on Armed Services meets this morning to receive testimony on three bills: S. 2489, the Small Business Competition Enhancement Act of 1984, which has been favorably reported by the Committee on Small Business and sequentially referred to the Committee on Armed Services; S. 2571, the Department of Defense Spare Parts Procurement Improvement Act of 1984, which is pending before this committee; and S. 2572, the Defense Spare Parts Procurement Reform Act, which is also pending before this committee.

[The bills follow:]

98TH CONGRESS
2D SESSION

S. 2489

To amend the Small Business Act to enhance competition in Government procurement.

IN THE SENATE OF THE UNITED STATES

MARCH 29 (legislative day, MARCH 26), 1984

Mr. WEICKER (for himself, Mr. DIXON, Mr. KASTEN, Mr. RUDMAN, Mr. NICKLES, Mr. SASSER, Mr. NUNN, Mr. DANFORTH, Mr. CHILES, Mr. D'AMATO, Mr. MOYNIHAN, Mr. HATCH, Mr. PRYOR, Mr. ABDNOR, Mr. BAUCUS, Mr. BOREN, Mr. HUDDLESTON, Mr. HECHT, Mr. FORD, Mr. HEFLIN, Mr. LEAHY, Mr. PELL, and Mr. SARBANES) introduced the following bill; which was read twice and referred to the Committee on Small Business

MAY 11 (legislative day, APRIL 30), 1984

Reported by Mr. WEICKER, with amendments

[Omit the part struck through and insert the part printed in italic]

Ordered referred to the Committee on Armed Services until June 8, 1984

A BILL

To amend the Small Business Act to enhance competition in Government procurement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Small Business Competition Enhancement Act of 1984".

PURPOSES

SEC. 2. The purposes of this Act are to—

(1) eliminate Federal procurement procedures and practices which ~~discourage or prevent participation by new competitors for Government contracts, especially small business concerns~~; *inhibit maximum free and open competition for Government contracts, especially by small business competitors;*

(2) use Federal contracting opportunities as a means to expand our Nation's industrial base, and thereby enable it to respond more quickly to the increased demands of the defense and civilian agencies in times of national emergency;

(3) reduce the number of noncompetitive contract awards; and

(4) foster *opportunities for* increased small business and small disadvantaged business participation in the *competitive* Federal procurement process.

PLANNING FOR FUTURE COMPETITION

SEC. 3. Section 15 of the Small Business Act is amended by adding at the end thereof the following:

"(m) To encourage the competitive acquisition of ~~requirements to~~ *supplies and services to support and* maintain a major system during its service life, the head of the Federal agency with responsibility for that system shall ensure that—

"(1) ~~the following are accorded weight as evaluation considerations in any competitive solicitation for the award of any development contract for a major system, to the maximum extent practicable considering the purposes for which the system is being procured:~~ *in any competitive solicitation for the award of any development contract for a major system, the following are accorded substantial weight as evaluation factors, giving due consideration to the purposes for which the system is being procured and the technology to achieve the system's required capabilities:*

"(A) Proposals to incorporate in the design of the major ~~system~~ *system,* components which are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source; and

"(B) Proposals to incorporate in the design of the major ~~system~~ *system,* ~~components whose associated technical data will permit the agency to competitively acquire~~ components that are likely to be required in substantial quantities during the system's service life *and will permit* *future competitive acquisitions by the Government;* ~~and~~

"(2) ~~the following are accorded substantial weight as evaluation considerations in any competitive solicitation for the award of any production contract for such major system:~~ *in any competitive solicitation for the award of any production contract for a major system, the following are accorded substantial weight as evaluation factors:*

"(A) Proposals to identify components in the system that are likely to be required in substantial quantities during the system's service life and ~~which provide for a predetermination as to~~ whether the technical data ~~associated with~~ *for* such components will ~~be restricted for further use;~~ *permit future competitive acquisitions by the Government; and*

"(B) ~~Separately priced options for the purchase or licensing of such restricted technical data by the Federal agency so as to permit the competitive acquisition of requirements for such components; and~~ *Proposals to identify technical data for sale or license to the Federal Government which the offeror, at its discretion, will identify and separately price so as to permit the Govern-*

ment to competitively acquire future requirements for such components:

~~"(C) Proposals to expand the participation of small and small disadvantaged business concerns in meeting the requirements of the prime contractor.~~

~~The foregoing evaluation considerations also shall be considered as negotiation objectives in making a noncompetitive award of a development contract or a production contract for a major system. The application of any of the requirements specified in paragraph (2) (A) or (B) of this subsection may be waived if the contracting officer determines in writing that such requirement would not be applicable to the production contract or otherwise would not be in the best interests of the Government in attaining the purposes for which the system is being procured, stating the reasons therefor. Such determination shall be made a part of the contract file.".~~

Provided, That the provisions of this paragraph (2) may be waived if the contracting officer determines in writing that such provisions would not be applicable to such production contract, giving due consideration to the stability of the system's design, or otherwise would not be in the best interests of the Government in attaining the purposes for which the system is being procured, stating the reasons therefor, and including such *determination and finding as part of the contract file; and*

"(3) the evaluation factors specified in paragraphs (1) and (2) of this subsection shall be considered as negotiation objectives when an agency is making a noncompetitive award of a development contract or a production contract for a major system.".

ENCOURAGING NEW COMPETITORS TO BROADEN THE INDUSTRIAL BASE

SEC. 4. ~~(a)~~ Section 15 of the Small Business Act is amended by adding at the end thereof the following new paragraph:

"(n)(1) Before a Federal agency may establish any prequalification requirement *applicable to an offeror or its product which would be considered as an element of responsiveness to a solicitation*, the Federal agency shall—

"(A) prepare a written justification stating the ~~reasons for the restriction and why free and open competition is not feasible;~~ *necessity for establishing the prequalification requirement and the reasons why free and open competition is not feasible;*

"(B) specify in writing and make available upon request all standards which a prospective contractor, or its product, must ~~meet~~ *satisfy* in order to become qualified, such standards being limited to those least restrictive to ~~attain the objective stated as the justification for the restriction;~~ *meet the purposes necessitating the establishment of the prequalification requirement;*

"(C) ~~provide a prompt opportunity for~~ *ensure that* a prospective contractor *is provided, upon request, a prompt opportunity* to demonstrate its ability to meet the standards specified for qualification, utilizing qualified personnel and facilities of the agency or another agency obtained through interagency agreement, or ~~the services of a private contractor~~ *other methods approved by the agency*: *Provided*, That any testing and evaluation services provided ~~by a private contractor should, whenever possible,~~ *under contract to the agency should* be provided by a contractor ~~other than a contractor who could reasonably~~ *who will not* be expected to benefit from an absence of additional qualified sources and ~~such contractor~~ *who* shall be required to adhere to any ~~restrictions~~ *restriction* on technical data asserted by the prospective contractor seeking qualification; and

"(D) ~~inform the prospective contractor promptly~~ *ensure that a prospective contractor seeking qualification is promptly informed* as to whether qualification has been attained, or in the event qualification has not been attained, information sufficient to specifically inform the prospective contractor why qualification was not attained.

"(2) Before a Federal agency may enforce any existing prequalification requirement on an offeror or its product, the Federal agency shall~~, upon request,~~ comply with the requirements of paragraph (1) of this subsection. A Federal agency need not delay a procurement action in order to provide a prospective contractor with an opportunity to demonstrate its ability to meet the standards specified for qualification.

"(3) In the event that the number of ~~currently~~ qualified sources or qualified products available to actively compete for anticipated future requirements is fewer than five, the Federal agency shall—

"(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification; and

"(B) ~~waive or otherwise~~ bear the cost of conducting the specified testing and evaluation, but excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated, *only* for a small business concern or a product manufactured by a small business concern~~, ultimately determined to be qualified.~~ *which has met the standards specified for qualification, and which could reasonably be expected to compete.*

The Federal agency may ~~request a certification from~~ *require* a prospective contractor ~~seeking the waiver or reimbursement of~~ *requesting* testing and evaluation costs *to certify* as to its status as a small business concern, and, in good faith, rely thereon. Nothing herein shall prohibit a Federal agency from funding, either before or after testing, some or all of the costs incurred by a small business concern in producing the product to be tested. The Federal agency may fund some or all of the cost of production and qualification for additional small business sources or the products manufactured by such sources beyond the five if the Federal agency determines that such additional qualified sources or products will expand the industrial mobilization base or is likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the Federal ~~agency.".~~ *agency.*

"(4) Within five years after the establishment of any prequalification requirement pursuant to paragraph (1), or within five years following an agency's enforcement of any existing prequalification requirement pursuant to paragraph (2), any such prequalification requirement shall be automatically terminated unless the Federal agency complies with the requirements of paragraph (1) of this subsection (n).

"(5) Whenever a Federal agency determines not to enforce an existing prequalification requirement for a solicita-

tion, the agency may not enforce any such prequalification requirement unless the agency complies with the requirements of paragraph (1) of this subsection (n).".

~~(b)(1)~~ *Sec. 5. (a)* Section 8(e) of the Small Business Act is amended—

~~(A)~~*(1)* by inserting before the semicolon at the end of subparagraph (3)(A) a comma and "and includes, as appropriate, agency nomenclature, National Stock Number or other part number, ~~and system application,~~ all amplified by a brief description relating to the item's form, fit or function, physical dimensions, predominant material of manufacture, or similar information to assist a prospective contractor to make an informed business judgment as to whether a solicitation should be requested";

~~(B)~~*(2)* by redesignating subparagraphs (B) and (C) of paragraph (3) as subparagraphs (C) and (E), respectively;

~~(C)~~*(3)* by inserting after subparagraph (A) of paragraph (3) a new subparagraph (B) as follows:

"(B) a procurement history and forecast of requirements, to the extent available, including—

"(i) date of last award and price thereof, number of units and unit price, time for performance, and whether the last contract was awarded competitively;

"(ii) aggregate dollar value and number of units procured during the last two fiscal years; and

"(iii) number of additional requirements (expressed in the same unit term as the procurement history) estimated for procurement during the remainder of the current fiscal year and each of the two succeeding fiscal years;";

~~(D)~~ *(4)* by inserting after subparagraph (C) of paragraph (3), as redesignated, a new subparagraph (D) as follows:

"(D) notations as to whether—

"(i) ~~the solicitation will reference technical data which a prospective contractor will be required to obtain from other governmental sources prior to submitting an offer; and~~ *the technical data required to respond to a solicitation will not be furnished as part of such solicitation, and identifying the governmental source, if any, from which the technical data may be obtained; and*

"(ii) ~~a prospective~~ *an* offeror or its product must be prequalified in order to have its offer considered for ~~award~~ *award,* and ~~identify~~ *identifying* the office from which the standards specified for prequalification may be obtained;"; and

~~(E)~~ *(5)* by redesignating paragraph (6) as paragraph (7) and inserting a new paragraph (6) as follows:

"(6) In order to further carry out the requirements of this subsection and section 223(a) of the Act of October 24, 1978 (Public Law 95-507, 15 U.S.C. 637b), each Federal agency shall—

"(A) publicly post in either full text or abstract format, ~~any solicitation~~ *or otherwise readily make available a compilation of information relating to, procurement actions* which would have been synopsized in the Commerce Business Daily if ~~it~~ *such procurement actions* had equalled or exceeded the applicable dollar threshold for ~~such publication~~ *publication;* and

"(B) ~~reasonably~~ make available to any small business concern, or to the authorized representative of such concern, the complete solicitation package for any ~~solicitation posted in abstract format~~ *on-going procurement action announced pursuant to this paragraph* and permit the copying thereof: *Provided, That a* ~~A~~ Federal agency may require the payment of a fee, not exceeding the actual cost of duplication.".

~~(2)~~ *(b)* Section 8(d)(1) of the Small Business Act is amended by adding at the end thereof the following new sentence: “It is further the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts and subcontracts for appropriate portions of subsystems, assemblies, components, and related services for major systems.”.

~~(3)~~ *(c)* Section 8(d)(3)(A) of the Small Business Act is amended by adding at the end thereof the following new sentence: “It is further the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts and subcontracts for appropriate portions of subsystems, assemblies, components, and related services for major systems.”.

TECHNICAL DATA MANAGEMENT TO FOSTER FUTURE COMPETITION

SEC. ~~5.~~ *6.* (a) Section 15 of the Small Business Act is *further* amended by adding at the end thereof the ~~following—~~ *following:*

“(o) To foster competition for the acquisition of ~~requirements~~ *supplies and services* to maintain a major system during its service life, the head of the Federal agency with responsibility for the system shall ~~insure~~ *ensure* that the initial and all subsequent production contracts *for a major system, developed under Government contract,* contain appropriate provisions related to technical data, including—

"(1) specifying the technical data ~~deliverable~~ *to be delivered* under the contract, *if any, including* ~~and a~~ delivery ~~schedule~~ *schedules* ~~therefor,~~ *therefor;* ~~including options for deferred delivery or multiple deliveries;~~

"(2) establishing criteria for determining the acceptability of technical data to be delivered under the contract;

"(3) establishing separate payment lines ~~relating to the delivery of technical data under the contract~~ *for the technical data to be delivered under the contract, if any,* and authorizing the withholding of payments for failure to make timely deliveries of acceptable data;

"(4) ~~specifying~~ *defining,* the respective rights of the Government and a contractor or subcontractor regarding *any* technical data to be ~~submitted~~ *delivered* under the contract, including therein a definition of the phrase 'developed at private expense';

"(5) identifying, in advance of *its* delivery, technical data which is to be delivered with restrictions on the Government's ~~rights in such data~~ *right to use such data for governmental purposes;*

“(6) requiring the contractor ~~to prepare or cause to be prepared in advance of delivery, and retain, a justification for any restriction to be asserted by the contractor or any subcontractor limiting the Government’s rights in such data;~~ *and each subcontractor to be prepared to furnish, within 60 days, a written justification for any restriction to be asserted limiting the Government’s right to use such data for governmental purposes, for as long as such restriction is asserted by the contractor or subcontractor;*

~~“(7) authorizing the Government to disclose limited rights data to a contractor retained by the Government solely for the purpose of reviewing the justification for the limitation placed on the data, and requiring such contractor to strictly adhere to any restrictions placed on the data;~~

“~~(8) specifying liquidated damages to be paid to the Government by the contractor or by a subcontractor in the event that the Government’s challenge to a limitation on the Government’s rights in technical data asserted by the contractor or a subcontractor is sustained;~~

“~~(9)~~ *(7)* prohibiting a contractor from requiring a subcontractor or the Government to pay a fee, royalty, or other charge for the subcontractor’s use of any technical data~~, except that protected by patent,~~ in the performance of a contract to furnish a component ~~or other requirement~~ directly to the Government, *except that data protected by patent, licensing agreement or any preexisting agreement involving a subcontractor's performance under a commerical contract,* if the same ~~technical~~ data was ~~furnished or otherwise~~ made available by the contractor to the subcontractor ~~for the performance of a contract between them~~ *furnishing that component;*

"~~(10)~~ *(8)* prohibiting the contractor from limiting, either directly or indirectly, ~~the Government's right to purchase directly from a subcontractor~~ *a subcontractor from selling to the Government* any component ~~or other requirement~~ *which the subcontractor had previously furnished to the contractor without* ~~restriction;~~ *restriction, except that the contractor may restrict a subcontrator from providing to the Government any component restricted by a preexisting agreement involving the subcontractor's performance for the contractor under its commercial contracts; and*

"~~(11)~~ *(9)* ascertaining and documenting the identity of the manufacturer of a component ~~by requiring the contractor, and each subcontractor at every tier, to annotate engineering drawings with such information; and~~

through the annotation of engineering drawings, the maintenance of lists, or otherwise.

~~"(12) requiring the contractor, and each subcontractor at every tier, to maintain a listing of the subcontractors and suppliers from whom it has purchased, or solicited to purchase, components included in the major system and granting to the Government the right to obtain a copy thereof.~~

~~The application of any of the provisions specified in this subsection may be waived.~~ *The provisions specified in this subsection shall be included in the single system of Government-wide procurement regulations, as defined in section 403 of title 41, United States Code, and may be waived in accordance with such procurement regulations* if the contracting officer determines in writing that any such provision would not be applicable to the production contract, or otherwise would not be in the best interests of the Government in attaining the purposes for which the system is being procured, stating the reasons therefor. Such determination shall be made part of the contract file.".

(b)(1) Within one year after the date of enactment of the Small Business Competition Enhancement Act of 1984, each Federal agency shall develop a plan for the management of technical data received under contracts for the development, production, modification, or maintenance of major systems within its jurisdiction. ~~Among other matters,~~ *At a minimum*, the management plan shall address *procedures for—*

~~(A) inventory of existing data;~~

~~(B)~~*(A)* ~~procedures for~~ *inventorying* indexing, storing, and updating items of technical data ~~entered~~ into ~~the~~ *a* system;

~~(C)~~*(B)* ~~techniques for~~ verifying contractor-imposed limitations on the Government's rights to make future use of the data in competitive acquisitions; and

~~(D)~~*(C)* ~~procedures to assure~~ *assuring* that agency procurement officials and ~~qualified~~ prospective contractors will have timely access to complete and current technical data for the competitive acquisition of ~~requirements~~ *supplies and services* for the maintenance of the system during its service life.

(2) Within 5 years after the date of enactment of the Small Business Competition Enhancement Act of 1984, each Federal agency shall complete implementation of the management plan required by paragraph (1), and include *in the system* the *available* technical data for each currently operational major system within its jurisdiction.

(3) Not later than eighteen months after the enactment of this section, the Comptroller General of the United States shall transmit to the Congress a report evaluating the plans of selected Federal agencies for the management of technical

data for major systems within their jurisdiction. The report shall include an evaluation of the plans of the Department of Defense, the Department of Energy and the Department of Transportation, and the National Aeronautics and Space Administration.

VALIDATING PROPRIETARY DATA RESTRICTIONS

SEC. ~~6.~~ *7.* Section 15 of the Small Business Act is amended by adding at the end thereof the following:

"(p)(1) ~~In order to competitively procure the maximum number~~ *To encourage the competitive acquisition* of components needed to maintain a major system during its service life, a review of the validity of any restriction on the Government's ~~rights in~~ *right to use for governmental purposes* technical data furnished under contract shall be initiated by the contracting officer, if the contracting officer, an agency advocate for competition, or an authorized representative of the Administration determines such a review is ~~warranted.~~ *warranted and the contracting officer determines that compliance with the asserted restriction makes it impracticable to competitively procure the required component.*

"(2) Upon the ~~request~~ *written demand* of the contracting officer, the contractor *or subcontractor, as appropriate,* shall submit its justification for the asserted restriction on the Government's ~~rights in such data,~~ *right to use such data for gov-*

ernmental purposes certifying to the current validity of the asserted restriction within—

"(A) 60 days, if the contract contains a provision that requires ~~the preparation and retention of~~ *a contractor or subcontractor to be prepared to furnish* a written justification for any restriction limiting the Government's ~~rights in~~ *right to use for governmental purposes* technical data to be delivered under the contract, or

"(B) 180 days, if the contract does not contain such a provision: *Provided, That the contracting officer may extend such time limits for a reasonable period for good cause shown.*

"(3) Upon a failure to submit any justification~~,—as required by~~ *pursuant to the requirements of* paragraph (2) of this subsection, the contracting officer shall, after *giving* notice ~~to the contractor~~, promptly cancel the restriction on the Government's ~~rights in~~ *right to use for governmental purposes* technical data for which justification had been requested.

"(4) If after review of the justification submitted pursuant to paragraph (2) of this subsection, the contracting officer determines that the justification for the ~~restrictions~~ *restriction* on the Government's ~~rights in~~ *right to use the data for governmental purposes* ~~the data~~ does not adequately support the

~~restrictions,~~ *restriction* the asserted ~~limitation~~ *restriction,* on the technical data and the justification therefor shall be promptly subjected to technical review and audit ~~by qualified personnel of the agency or another Federal agency obtained through interagency agreement, or a private contractor who is capable of providing an impartial review and who shall be required to adhere to any asserted restrictions on technical data.~~.

"(5) If after reviewing the findings of the technical review and audit, it is determined that the ~~limitation~~ *restriction* on the Government's ~~rights in the data~~ *right to use such data for governmental purposes* warrants challenge, the contracting officer shall issue a final decision pertaining thereto which shall be subject to the provisions of the Contract Disputes Act (41 U.S.C. 601 et seq.).

"(6) If the Government's challenge to the restriction on the Government's ~~rights in~~ *right to use for governmental purposes* technical data as certified pursuant to paragraph (2) of this subsection is sustained, upon final disposition—

"(A) the restriction on the Government's ~~rights in~~ *right to use that* technical data *for governmental purposes* shall be cancelled; and

"(B) the contractor *or subcontractor, as appropriate,* shall be liable to the Government for

~~“(i) the liquidated damages specified in the contract; and~~

~~“(ii)~~ the Government's cost of technically evaluating and auditing the asserted restriction, and the fees and other expenses, as defined in section 2412~~(a)~~*(d)*(2)(A) of title ~~18~~ *28,* United States Code, incurred by the Government in challenging the asserted restriction, if the asserted restriction, as certified, is found not to be substantially justified, unless special circumstances would make such awards unjust.”.

BREAKOUT PROCUREMENT CENTER REPRESENTATIVES

SEC. ~~7.~~ *8.* Section 15 of the Small Business Act (15 U.S.C. 644) is amended by adding at the end thereof the following:

“(q)(1) The Administration shall assign to each major procurement center a breakout procurement center representative, with such assistance as may be appropriate~~, who shall be an advocate for the competitive procurement of the center's requirements and be responsible for executing the functions described under paragraph (2)~~. *In carrying out the functions described in paragraph (2), such representative shall be an advocate for the breakout of components for competitive procurement whenever possible while maintaining the* *integrity of the system in which such components are used, and be an advocate for the competitive procurement of the supplies and services procured by the center.* Any breakout procurement center ~~representatives~~ *representative* appointed under ~~the authority of the preceding sentence~~ *this subsection* shall be distinct ~~from~~ *from,* and in addition ~~to~~ *to,* any *other* procurement center ~~representatives~~ *representative* who may be, from time to time, assigned by the Administration to ~~various~~ *a* procurement ~~centers~~ *center* for the purpose of advocating increased small business participation.

“(2) ~~The~~ *In addition to carrying out the responsibilities assigned by the Administrator, a* breakout procurement center representative is empowered to—

“(A) participate as a regular member of any provisioning conference, or similar evaluation session relating to maintaining a major system during its service life, during which determinations are made as to whether requirements are to be procured through other than free and open competition;

“(B) review, at any time, restrictions on competition previously imposed on requirements through acquisition method coding or similar procedures, and to request prompt reevaluation of such limitations on competition by agency personnel;

"(C) review restrictions on competition arising out of restrictions on the Government's rights in technical data and, when appropriate, recommend that the contracting officer initiate a review of the validity of such an asserted restriction;

"(D) ~~obtain from any governmental source technical data suitable for the preparation of a competitive solicitation package for any requirement previously procured noncompetitively due to the nonavailability of unrestricted technical data and make it available for validation by appropriate procurement center personnel; and~~ *obtain from any source, and make available to the appropriate procurement center personnel, unrestricted technical data necessary for the preparation of a competitive solicitation package for any item of supply or service previously procured noncompetitively due to the unavailability of such unrestricted data; and*

"(E) have access to the unclassified procurement records and other data of the procurement center so as to facilitate effective discharge of the foregoing functions and to permit the preparation of complete and accurate reports to the ~~Administration~~ *Administration;*

"(F) receive unsolicited value-engineering proposals, forwarding them with or without recommendation to procurement center personnel responsible for review-

ing such proposals and who shall furnish the breakout procurement center representative with information regarding any action taken with respect to any such proposal; and

"(G) review the procurement practices of the center and make recommendations to the Administrator who shall, as appropriate, consult with the responsible agency procurement executive regarding the implementation thereof.

"(3)(A) Each Federal agency having one or more major procurement centers shall assign technical advisors to each major procurement center to which the Administration has assigned a breakout procurement center representative.

"(B) Technical advisors assigned under this paragraph shall be—

"(i) full-time employees of such agency;

"(ii) colocated with the assigned breakout procurement center representative; and

"(iii) fully qualified, technically trained, and familiar with the supplies and services procured by the major procurement center.

At least one such technical advisor ~~position~~ *assigned to each major procurement center* shall be ~~classified as requiring~~ an accredited engineer.

"(C) The primary duty of a technical advisor assigned under this paragraph shall be to assist the breakout procurement center representative for the center to which such advisor is assigned in carrying out his functions.

"(4) There are authorized to be appropriated to the Administration such sums as may be necessary to carry out the provisions of *paragraphs (1) and (2) of* this subsection.".

CERTIFICATE OF COMPETENCY

SEC. 9. Section 8(b)(7) of the Small Business Act is amended by adding at the end thereof the following: "Notwithstanding the first sentence of this subsection, the Administration may not establish an exemption from referral or notification or refuse to accept a referral or notification from a Government procurement officer made pursuant to subparagraph (A) or (B) of this paragraph, but nothing in this paragraph shall require the processing of an application for certification if the small business concern to which the referral pertains declines to have the application processed. If a Government procurement officer proposes to deny a contractor's decision to use a small business concern as a subcontractor because of a lack of any element of responsibility provided for in subparagraphs (A) or (B) of this paragraph, such officer may not preclude the contractor from subcontracting to such small business concern without referring the matter for final disposition to the Administration.".

DEFINITIONS

SEC. ~~8.~~ *10.* Section 3 of the Small Business Act is amended by adding at the end thereof the following:

"(j) For the purpose of this Act and section ~~5~~*6*(b) of the Small Business Competition Enhancement Act of 1984, the term—

"(1) 'component' means any individual part, subassembly, assembly, or subsystem integral to a major system, which may be replaced during the service life of the system. The term includes spare part and replenishment spare part. The term does not include packaging or labeling associated with shipment or identification of a 'component';

"(2) 'major procurement' center means a procurement center that awarded contracts for components other than commercial items totaling at least $150,000,000 in the preceeding fiscal year;

"(3) 'major system' means a combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property. A system shall be considered a 'major system' if: (a) the Department of Defense is responsible for the system and the total expenditures for research, development, test and evaluation are estimated to be more than $75,000,000 (based on fiscal year 1980 constant dollars) or an eventual total expenditure for procurement of more than $300,000,000 (based on fiscal year 1980 constant dollars); or (b) a civilian agency is responsible for the system and total expenditures for the system are estimated to exceed $750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a 'major system' established by the agency pursuant to Office of Management and Budget (OMB) Circular A–109, entitled 'Major Systems Acquisitions', whichever is greater, or (3) any system designated a 'major system' by the head of the agency responsible for the system;

"(4) 'technical data' means recorded information, ~~regardless of form or characteristic, of a scientific or technical nature. It documents research, experimental, developmental or engineering work, or is usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs; text in specifications or related performance or design-type documents; or computer printouts. Examples of technical data include research and engineering data, engineering drawings~~

~~and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications and related information. Technical data does not include computer software, financial, administrative, cost or pricing, and management data, or other information incidental to contract administration. 'Technical data', as herein defined, does not include technical data for commercial products or components thereof developed at private expense.".~~ *(regardless of form or method of recording) of a scientific or technical nature, including data resulting from work which was specified as an element of performance of a contract from the United States, but does not include—*

"(i) computer software and documentation;

"(ii) financial, administrative, cost or pricing, management data, or other information incidential to contract administration;

"(iii) data relating to products, components, or processes developed at private expense; or

"(iv) data relating to products, components, or processes developed solely at private expense and offered for sale to the general public.".

~~EFFECTIVE DATE~~

~~SEC. 9. (a) Except as provided in subsection (b), the amendments made by this Act shall take effect upon the expi-~~

~~ration of 180 days following the date of enactment of this Act.~~

~~(b) The amendment made by section 7 and the provisions of section 5(b) of this Act shall take effect on the date of enactment of this Act.~~

EFFECTIVE DATES

SEC. 10. (a) Sections 6(b), 8, 9, and 10 shall take effect on the date of enactment of this Act.

(b) Sections 4 and 7 of this Act shall take effect 180 days after the enactment of this Act.

(c) The amendments made to section 8(e) of the Small Business Act by section 5(a) of this Act shall apply to procurement actions initiated 180 days after the date of enactment of this Act.

(d) The amendments made to section 8(d) of the Small Business Act by section 5 of this Act shall take effect immediately upon enactment, and shall be included in all contracts required to contain the clauses contained in paragraph (3) of section 8(d) of the Small Business Act which are awarded on or after 180 days following the date of enactment of this Act.

(e) The amendments made to section 15 of the Small Business Act by sections 3 and 6 of this Act shall take effect immediately and shall be included in appropriate solicitations for bids or proposals issued on or after 180 days after the effective date of this Act.

98TH CONGRESS
2D SESSION

S. 2571

To amend title 10, United States Code, to improve the procedures for procurement of technical data and spare parts by the Department of Defense, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 12 (legislative day, MARCH 26), 1984

Mr. LEVIN (for himself, Mr. BINGAMAN, and Mr. JEPSEN) introduced the following bill; which was read twice and referred to the Committee on Armed Services

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A BILL

To amend title 10, United States Code, to improve the procedures for procurement of technical data and spare parts by the Department of Defense, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Department of Defense Spare Parts Procurement Improvement Act of 1984".

TECHNICAL DATA: PURCHASE AND WARRANTY

SEC. 2. (a) Chapter 141 of title 10, United States Code, is amended by inserting after section 2386 the following new section:

"§ 2386a. Technical data rights

"(a) For the purposes of this section—

"(1) 'agency' means an agency referred to in section 2303(a) of this title;

"(2) 'technical data', when used with respect to property (other than real property) procured by an agency, means recorded information (regardless of the form or method of the recording, including computer software) of a scientific or technical nature (including engineering data) relating to the property and used throughout the life cycle of the property for the purposes of performing management, engineering, maintenance, modification, test, and other functions relating to the property and to procure spares or additional spares of such property; and

"(3) 'unlimited rights' means, with respect to technical data required to be made available or delivered to the United States under a contract, legal authority of the United States to use, duplicate, or disclose the technical data for any purpose and the legal authority to have or permit others to do so.

"(b) (1) Except as provided in paragraph (2), when an agency enters into a contract to procure property (other than real property) and it is possible that the agency will need to procure additional quantities of such property in the future, the agency shall purchase unlimited rights to the technical data related to the property. A contract providing for the purchase of technical data shall include clauses setting out the requirements of subsections (c), (d), (e), and (f).

"(2) An agency is not required to purchase unlimited rights to technical data under paragraph (1) if the head of the agency, or his designee, determines that the purchase of the technical data is not economically advantageous to the United States because of the price of the technical data or the nature of the property to which the technical data relates or because it is unlikely that the agency will need to procure additional quantities of such property in the future. The individual making the determination shall make written findings including the specific facts and circumstances relied on by the individual to support the determination.

"(c) Technical data purchased under subsection (b) (1) shall—

"(1) be made available to the purchasing agency within a reasonable time period, upon request of the agency, on or after the date on which the first item of property to which the technical data relates is delivered to the agency; and

"(2) be delivered to the purchasing agency not later than two years after the date on which the first item of property to which the technical data relates is delivered to the agency, or not later than any earlier date provided by the contract for the purchase of the technical data.

"(d) Whenever an engineering design change is made under a contract to procure property after the technical data relating to the property has been made available or delivered to an agency pursuant to a contract to purchase the technical data, the contractor shall revise the technical data to reflect the change and shall, within a reasonable time determined by the head of the agency or his designee, make available or deliver the revised technical data to the agency.

"(e) A contractor making available or delivering technical data to an agency shall—

"(1) certify that the technical data is (at the time the technical data is made available or delivered) complete, accurate, and adequate for the purpose for which the technical data is procured; and

"(2) agree to promptly correct any such technical data that is incomplete, inadequate, or deficient or promptly furnish to the agency updated technical data that is complete, accurate, and adequate.

For the purposes of clause (2) of the first sentence, the head of the agency or his designee shall determine whether technical data is complete, accurate, and adequate.

"(f) A contractor shall not be entitled to receive progress payments under a contract during any period that the contractor does not meet the requirements of subsection (d), (e) (1), or (e) (2).".

(b) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2386 the following new item:

"2386a. Technical data rights.".

COMPETITION BREAKOUT ACTIONS: PROPRIETARY INTERESTS

SEC. 3. (a) (1) Chapter 141 of title 10, United States Code, is further amended by inserting after section 2386a (as added by section 2) the following new section:

"§ 2386b. Proprietary interest of contractor

"(a) Each production contract entered into by an agency referred to in section 2303 (a) of this title shall include a clause providing that the contractor, after the last day of a specified period beginning on the date of contract award, shall not have a proprietary interest in technical data (as defined in section 2386a(a)(2) of this title) or other data developed by the contractor in connection with such item. For the purposes of the first sentence, the specified period shall be five years unless the head of the agency, for good cause, agrees to a longer period.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2386a (as added by section 2) the following new item:

"2386b. Proprietary interest of contractor.".

(b) (1) The advocate for competition designated pursuant to section 2306a of title 10, United States Code (as added by section 6 of this Act), for an agency referred to in section 2303(a) of such title shall, not later than four years after the date of enactment of this Act, review each designation of proprietary interest applicable in the case of property purchased by the agency and determine whether the designation is appropriate.

(2) In the case of a designation of proprietary interest determined by the advocate for competition of an agency to be inappropriate under paragraph (1), the head of the agency shall take such action as is appropriate to remove the designation for the purposes of procurements carried out by the agency.

(3) In the case of a designation of proprietary interest determined by the advocate for competition of an agency to be appropriate under paragraph (1), the head of the agency shall—

(A) analyze the property to which the designation relates to determine the engineering and design specifications of the property; and

(B) take such action as is appropriate to remove the designation not later than the last day of the seventeen-year period beginning on the date of the award of the contract under which the property was purchased.

(c)(1) Chapter 137 of title 10, United States Code, is amended by adding at the end thereof the following new section:

"§ 2317. Special requirements for solicitations; proprietary interests

"(a) Each solicitation for bids or proposals for a contract to supply property (other than real property) to an agency shall include a clause requesting each contractor responding to the solicitation to state the extent of the proprietary interest the contractor expects to apply with respect to any part or component of the property to be procured and the period for which any designation of proprietary interest with respect to the part or component will be in effect.

"(b) The statements received under subsection (a) shall be considered for the purpose of determining the bid or proposal that is most advantageous to the United States.".

(2) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"2317. Special requirements for solicitations; proprietary interests.".

ADDITIONAL COMPETITION BREAKOUT ACTIONS

SEC. 4. (a) Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall prescribe by regulation the manner in which the Department of Defense negotiates prices for supplies procured from a contractor which does not produce the supplies and does not add significant value to the total value of the supplies. The regulation shall include provisions reasonably limiting the amount of overhead costs which such a contractor may allocate to any item of supplies.

(b) Section 2384 of title 10, United States Code, is amended to read as follows:

"§ 2384. Supplies; marking with name of contractor

"Each contractor furnishing supplies to an agency referred to in section 2303(a) of this title shall, in the manner directed by the head of the agency, either—

"(1) mark—

"(A) on each item supplied the name of the contractor furnishing the item and the contractor's stock number for the item; and

"(B) on each item (or part of the item) not originally manufactured or produced by the contractor the name of the original manufacturer or producer of the item or part and that manufacturer or producer's stock number for the item or part; or

"(2) include in all technical data (as defined in section 2386a(a)(1) of this title) relating to such item and delivered to the agency the name of the vendor or original manufacturer of the item or part to which the technical data relates and that manufacturer or producer's stock number for that item or part.

Supplies to which this section applies may not be received unless the requirements of this section are satisfied.".

COST AND PRICING DATA

SEC. 5. Section 2306 (f) (1) of title 10, United States Code, is amended by striking out "$500,000" each place it appears and inserting in lieu thereof "$100,000" in each such place.

ADVOCATE FOR COMPETITION

SEC. 6. (a) Chapter 137 of title 10, United States Code (as amended by section 3), is further amended by inserting after section 2306 the following new section:

"§ 2306a. Advocate for competition

"(a) Each head of an agency shall—

"(1) designate for such agency one officer or employee of the agency to serve as the advocate for competition for the agency;

"(2) relieve such officer or employee of all duties and responsibilities that are inconsistent with the duties and responsibilities of the advocate for competition; and

"(3) provide such officer or employee with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition.

"(b)(1) The advocate for competition of an agency shall promote competition in the procurement of property and services by the agency.

"(2) The advocate for competition of an agency shall—

"(A) review the purchasing and contracting activities of the agency;

"(B) identify and report to the head of the agency—

"(i) opportunities to achieve competition on the basis of price and other significant factors in the purchases and contracts of the agency;

"(ii) solicitations and proposed solicitations which include unnecessarily detailed specifications or unnecessarily restrictive statements of need which may reduce competition in the procurement activities of the agency; and

"(iii) any other condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the agency; and

"(C) prepare and transmit to the head of the agency an annual report describing his activities under this section.".

(b) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2306 the following new item:

"2306a. Advocate for competition.".

ECONOMIC ORDER QUANTITIES

SEC. 7. (a) Chapter 141 of title 10, United States Code, is amended by inserting after section 2384 the following new section:

"§ 2384a. Supplies: economic order quantities

"(a)(1) An agency referred to in section 2303(a) of this title shall procure supplies in such quantity as (A) will result in the total cost and unit cost most advantageous to the United States, and (B) does not exceed the quantity reasonably expected to be required by the agency during a fiscal year or longer period for which an appropriation is available for the purpose of procuring such supplies.

"(2) The Secretary of Defense shall take paragraph (1) into account in approving rates of obligation of appropriations under section 2204 of this title.".

"(b) Each solicitation for a supply contract shall include a clause requesting each contractor responding to the solicitation to state an opinion on whether the quantity of the supplies proposed to be procured is economically advantageous to the United States and, if applicable, to recommend two quantities which would be more economically advantageous to the United States. Each such recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.".

(b) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2384 the following new item:

"2384a. Supplies: economic order quantities.".

EFFECTIVE DATE

SEC. 8. (a) Except as provided in subsection (b), the amendments made by this Act shall take effect at the end of the 180-day period beginning on the date of the enactment of this Act and shall apply with respect to contracts for which bids or proposals are solicited after the end of such period.

(b) The amendments made by section 6 shall take effect at the end of the 90-day period beginning on the date of the enactment of this Act.

98TH CONGRESS
2D SESSION

S. 2572

To amend title 10, United States Code, to provide for more cost effective and efficient purchases of spare parts by the Department of Defense, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 12 (legislative day, MARCH 26), 1984

Mr. LEVIN (for himself and Mr. JEPSEN) introduced the following bill; which was read twice and referred to the Committee on Armed Services

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A BILL

To amend title 10, United States Code, to provide for more cost effective and efficient purchases of spare parts by the Department of Defense, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Defense Spare Parts Procurement Reform Act".

CONGRESSIONAL FINDINGS AND POLICY DIRECTION

SEC. 2. The Congress finds that recent disclosures of excessive payments by the Department of Defense for replenishment parts have undermined confidence by the public and

Congress in the defense procurement system. The Secretary of Defense should make every effort to reform procurement practices relating to replenishment parts. Such efforts should, among other matters, be directed to elimination of excessive pricing of replenishment spare parts and the recovery of unjustified payments. Specifically, the Secretary should—

(1) direct that officials in the Department of Defense refuse to enter into contracts unless the proposed prices are fair and reasonable;

(2) continue and accelerate ongoing efforts to improve defense contract procedures in order to encourage effective competition and assure fair and reasonable prices;

(3) direct that replenishment parts be acquired in economic order quantities and on a multiyear basis whenever feasible and practicable and cost effective;

(4) direct that standard or commercial parts be used whenever such use is technically acceptable and cost effective; and

(5) vigorously continue reexamination of policies relating to acquisition, pricing, and management of replenishment parts and of technical data related to such parts.

PERSONNEL EVALUATIONS TO INCLUDE EMPHASIS ON COMPETITION AND COST SAVINGS

SEC. 3. (a) Chapter 137 of title 10, United States Code, is amended by adding at the end thereof the following new section:

"§ 2317. Encouragement of competition and cost savings

"The Secretary of Defense shall establish procedures to ensure that personnel appraisal systems of the Department of Defense give appropriate recognition to efforts to increase competition and achieve cost savings in areas relating to contracts covered by this chapter.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"2317. Encouragement of competition and cost savings.".

IDENTIFICATION OF SOURCES OF SUPPLIES

SEC. 4. (a) Section 2384 of title 10, United States Code, is amended to read as follows:

"§ 2384. Supplies: identification of supplier and sources

"(a) The Secretary of Defense shall require that the contractor under a contract with the Department of Defense for the furnishing of supplies to the United States shall mark or otherwise identify supplies furnished under the contract with the name of the contractor and the national stock number for the supplies furnished or, if there is no such number for an item, the contractor's stock number for the item.

"(b) The Secretary of Defense shall prescribe regulations requiring that, whenever practicable, each contract for supplies (or an item that is a replaceable component of such supplies) require that the contractor identify—

"(1) the name of the actual manufacturer or producer of the item or of all sources of supply of the contractor for that item;

"(2) the national stock number of the component or part or, if there is no such number, the stock number of the actual manufacturer or producer or of each source; and

"(3) the source of any technical data delivered under the contract.

"(c) Identification of supplies, components, and technical data under this section shall be made in the manner prescribed by the Secretary of Defense.".

(b) The item relating to such section in the table of sections at the beginning of chapter 141 of such title is amended to read as follows:

"2384. Supplies: identification of supplier and sources.".

PROHIBITION OF LIMITING DIRECT SALES BY SUBCONTRACTORS TO THE UNITED STATES

SEC. 5. (a) Chapter 141 of title 10, United States Code, is amended by adding at the end thereof the following new section:

"§ 2402. Prohibition of contractors limiting subcontractor sales directly to the United States

"(a) Except as provided in subsection (b), each contract for the purchase of supplies or services made by the Department of Defense shall provide that the contractor will not—

"(1) enter into any agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item or process (including computer software) like those made, or services like those furnished, by the subcontractor under the contract (or any follow-on production contract); or

"(2) otherwise act to restrict unreasonably the ability of a subcontractor to make sales to the United States described in clause (1).

"(b) This section does not prohibit a contractor from asserting rights it otherwise has under law.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"2402. Prohibition of contractors limiting subcontractor sales directly to the United States.".

DEFINITIONS

SEC. 6. Section 2302 of title 10, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(4) 'Technical data' means recorded information (regardless of the form or method of the recording) of a scientific or technical nature. It does not include computer software.

"(5) 'Unlimited rights' means, with respect to technical data required to be delivered to the United States under a contract, legal authority of the United States to use, duplicate, and disclose the technical data for any purpose and the legal authority to have or permit others to do so.

"(6) 'Developed at private expense' means, with respect to an item (or technical data relating to an item) delivered to the United States under a contract, developed without direct payment by the United States under a provision of the contract which requires the performance of the development effort.".

PLANNING FOR PROCUREMENT OF SUPPLIES

SEC. 7. Section 2304 of title 10, United States Code, is amended by adding at the end thereof the following new subsections:

"(j) The Secretary of Defense shall ensure that before a contract for the delivery of supplies to the Department of Defense is entered into—

"(1) When the appropriate officials of the Department are making an assessment of the most advantageous procedure for acquisition of the supplies (considering quality, price, delivery, and other factors), there is a review of the availability and cost of each item of supply—

"(A) through the supply system of the Department of Defense; and

"(B) under standard Government supply contracts, if the item is in a category of supplies defined under regulations of the Secretary of Defense as being potentially available under a standard Government supply contract; and

"(2) there is a review of both the procurement history of the item and a description of the item, including, when necessary for an adequate description of the item, a picture, drawing, diagram, or other graphic representation of the item.

"(k)(1) The Secretary of Defense shall prescribe regulations requiring that, whenever practicable, an offeror submitting a proposal for a contract shall furnish information in the proposal identifying—

"(A) with respect to all items that will be delivered to the United States under the contract (other than items to which paragraph (2) applies), those items for which technical data will not be provided to the United States; and

"(B) with respect to technical data that will be delivered to the United States under the contract, any of such technical data that will not be provided with unlimited rights.

"(2) With respect to items that will be delivered to the United States under a contract described in paragraph (1) with respect to which it would be impracticable to ascertain, at the time the contract is entered into, the technical data relating to such items that will not be provided to the United States with unlimited rights, the contract shall require that the contractor shall provide identifying information similar to that required to be furnished under subsection (a) at a time to be specified in the contract.

"(3) The Secretary of Defense shall ensure that information furnished under paragraph (1) is considered in selecting the contractor for the contract.".

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE

SEC. 8. (a)(1) Chapter 141 of title 10, United States Code, is amended by inserting after section 2386 the following new section:

"§ 2386a. Rights in technical data and computer software

"(a) A contract for supplies entered into by the Department of Defense which provides for delivery of technical data or computer software to the United States shall provide that the United States shall have unlimited rights in—

"(1) technical data and computer software resulting directly from performance of experimental, developmental, or research work which was specified as an element of performance in a Government contract or subcontract;

"(2) computer software required to be orginated or developed under a Government contract or generated as a necessary part of performing a contract;

"(3) computer data bases prepared under a Government contract consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain;

"(4) technical data necessary to enable manufacture of end-items, components, and modifications, or to enable the performance of processes, when the end-items, components, modifications, or processes have been, or are being, developed under a Government contract or subcontract in which experimental, developmental, or research work is or was specified as an element of contract performance, except technical data pertaining to items, components, processes, or computer software developed at private expense;

"(5) technical data and computer software prepared or required to be delivered under a Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

"(6) technical data pertaining to end-items, components, or processes prepared or required to be delivered under a Government contract or subcontract for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements;

"(7) manuals or instructional materials prepared or required to be delivered under the contract or any subcontract of the contract for installation, operation, maintenance, or training purposes;

"(8) technical data or computer software which is in the public domain or which has been or is normally released or disclosed by the contractor or subcontractor without restriction on further disclosure; and

"(9) technical data or computer software for which unlimited rights in such data or software are otherwise provided for under the contract.

"(b)(1) Each contract for the acquisition of supplies which includes a requirement for the contractor to furnish technical data or computer software to the United States shall provide—

"(A) that the contractor agrees to have a data management system approved by the Department of Defense in operation before the United States accepts delivery of any data required to be delivered to the United States under the contract; and

"(B) that the United States may ignore, correct, or cancel any restriction on the release of technical data or computer software that is not authorized by the contract if the contractor fails to substantiate, within sixty days after receiving a written request from the United States for such substantiation, the propriety of the restriction.

"(2) Each contract described in paragraph (1) shall provide that if—

"(A) the contractor asserts that the United States is not entitled to unlimited rights in technical data relating to an item, component, or process; and

"(B) the assertion is not sustained and it is determined that the assertion was not substantially justified,

the contractor shall be required to pay to the United States the costs to the United States of contesting the assertion.

"(3) Rights of the United States under paragraphs (1)(B) and (2) may not be asserted after the end of the three-year period beginning on the date of final payment by the United States under the contract, unless the contract provides for a different period of time.

"(4) Notwithstanding the inspection and acceptance by the United States of technical data furnished under a contract and notwithstanding any provision of the contract concerning the conclusiveness of such inspection and acceptance, the contractor shall warrant in the contract that all technical data delivered under the contract will at the time of delivery to the United States conform with the specifications and all other requirements of the contract or the contractor will correct the technical data to so conform. The period of such a warranty shall be as provided for in the contract.

"(c) The Secretary of Defense shall prescribe by regulation standards for determining whether a contract entered into by the Department of Defense shall provide that, after a time to be specified in the contract, the United States shall have the right to use (or have used) for any purpose of the United States all technical data (including technical data of subcontractors at any tier) required to be delivered to the United States under the contract. The time specified in a contract with respect to such a right of the United States in any such data may not exceed seven years from the date the data was required to be delivered to the United States or the date an item to which such data relates was required to be delivered to the United States, whichever is earlier.

"(d) Nothing in this section shall be construed as affecting rights of the United States or of any contractor or subcontractor with respect to patents, copyrights, or any other law establishing particular rights in technical data.

"(e) In this section, 'technical data', 'unlimited rights', and 'developed at private expense' have the meaning given those terms in section 2302 of this title.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2386 the following new item:

"2386a. Rights in technical data and computer software.".

(b)(1) Not later than one year after the date of the enactment of this Act, the Secretary of Defense shall develop a plan for a system for the acquisition and management of technical data appropriate for the acquisition of replenishment parts under the jurisdiction of that department. The plan shall address the possibility of a uniform system that would allow exchange of information among the military departments and the Defense Logistics Agency. The plan shall also address the possibility of a centralized system to identify the repository location of technical data relating to any item and the types of data on file in that repository.

(2) The Secretary of Defense shall ensure that the plan developed under paragraph (1) is implemented not later than five years after the date of the enactment of this Act.

COMPETITION ADVOCATES

SEC. 9. (a) Chapter 137 of title 10, United States Code, is amended by inserting after section 2306 the following new section:

"§ 2306a. Competition advocates

"(a) The head of each agency shall designate a person within that agency to be the competition advocate for the agency and shall designate a competition advocate for each procuring activity of the agency. The competition advocates shall promote the use of competitive methods of procurement.

"(b) The head of each agency shall prescribe by regulation the functions of competition advocates. Such regulations shall provide that each competition advocate shall—

"(1) advocate changes to policies and procedures to encourage maximum consideration of opportunities for competition during the acquisition process (including the supply process); and

"(2) challenge practices and procedures that inhibit competition, including unnecessarily restrictive statements of agency needs, unnecessarily detailed or restrictive specifications, use of procurement method codes, and other actions that could result in an inappropriate noncompetitive procurement.

"(c) The head of each agency shall ensure that—

"(1) there is a program within the agency to actively maintain and reassess programs to increase competitive procurement of replenishment parts;

"(2) there is a system within the agency for review of noncompetitive acquisitions; and

"(3) each competition advocate within the agency has access to personnel within the agency who can advise the competition advocate in specialized areas relating to competition, including persons who are specialists in engineering, technical operations, contract administration, financial management supply management, and utilization of small and disadvantaged business concerns.

"(d) This section does not apply to the Coast Guard or the National Aeronautics and Space Administration.".

(b) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2306 the following new item:

"2306a. Competition advocates.".

ANNUAL REPORT

SEC. 10. Chapter 137 of title 10, United States Code, is amended by adding after section 2317 (as added by section 3) the following new section:

"§ 2318. Annual report on competition for supplies

"(a) The Secretary of Defense shall submit to Congress, not later than December 15 of each year, a report on the management by that department of the acquisition of replenishment parts during the preceding fiscal year.

"(b) Each report under this section shall include—

"(1) a report on the activities of the competition advocates of the Department of Defense during the preceding fiscal year; and

"(2) the rate of competition for contracts for supplies entered into by the Department during the preceding fiscal year, shown (A) by the number of contracts awarded competitively as a percentage of the total number of contracts awarded, and (B) by the dollar value of contracts awarded competitively as a percentage of the total dollar value of contracts awarded.

"(c) All information in reports under this section shall be shown for the Department as a whole and for each of the military departments and the Defense Logistics Agency.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 2317 (as added by section 3) the following new item:

"2318. Annual report on competition for supplies.".

PUBLICATION OF PROPOSED REGULATIONS

SEC. 11. Section 2303 of title 10, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) Regulations prescribed under this chapter by the Secretary of Defense or the Secretary of a military department may not take effect until thirty days after such regulations have been published in the Federal Register for public comment.".

EFFECTIVE DATE

SEC. 12. (a) Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect at the end of the one-hundred-and-eighty-day period beginning on the date of the enactment of this Act and shall apply with respect to contracts for which bids or proposals are solicited after the end of such period.

(b)(1) Sections 2 and 8(d) and the amendments made by sections 3, 10, and 11 shall take effect on the date of the enactment of this Act.

(2) The amendments made by section 9 shall take effect at the end of the ninety-day period beginning on the date of the enactment of this Act.

Senator QUAYLE. Tomorrow I hope to proceed to markup on the warranties provision, general procurement regulations, and a couple of miscellaneous provisions dealing with defense procurement.

Next Tuesday, at 9:30 a.m., we will mark up S. 2489, if that is agreeable.

If there are any additions or changes, please let me know today.

I also will not break at 11 a.m. for the session of the Senate unless there is objection to that. I hope to finish our markup by 11:45. I think we can get through our three panels by then. If not, we will come back this afternoon and finish up.

Tomorrow we will mark up warranties, general regulations, and a couple of miscellaneous items on procurement. Next Tuesday, at 9:30, we will mark up S. 2489 and the other two bills that are pending before the committee.

I will say at the outset that I think competition in defense procurement is not only important, but an issue that I am delighted to see this committee begin to deal with.

I am delighted that Chairman Tower has created an ad hoc task force. We will be meeting today, tomorrow, and next Tuesday and we will have a report and direct presentation to the full committee markup next week.

The bill reported by the Small Business Committee is of utmost importance to all of us, but I think the full tenor and base of having proposals on competition laid out in these bills certainly offer an opportunity for direction and comment which we will be hearing today.

I have an opening statement that I will insert in the record, and I now turn to the ranking member, Senator Levin, for any opening statement or comments he might wish to make.

[The prepared statement of Senator Dan Quayle follows:]

PREPARED STATEMENT OF SENATOR DAN QUAYLE

The Ad Hoc Task Force on Selected Defense Procurement Matters of the Committee on Armed Services meets this morning to receive testimony on three bills—S. 2489, the Small Business Competition Enhancement Act of 1984, which has been favorably reported by the Committee on Small Business sequentially referred to the Committee on Armed Services; S. 2571, the Department of Defense Spare Parts Procurement Improvement Act of 1984, which is pending before the Committee; and S. 1572, the Defense Spare Parts Procurement Reform Act, which is also pending before Committee.

This is the first meeting of the Task Force since it was established earlier this year by Senator Tower, Chairman of the Committee on Armed Services. The Task Force is responsible for oversight and legislation dealing with weapon system warranties, spare parts procurement, multi-year procurement, competition, small business contracting, and other matters assigned by the Chairman.

Let me say at the outset that I am most pleased that Senator Tower has established this Task Force, and I am enthusiastic about the opportunity to serve as its Chairman. Though the Committee on Armed Services has always been concerned about acquisition process issues at DOD, I am confident that the Task Force will enhance the Committee's ability to consider legislation in this area and to exercise vigorous oversight of the Department's procurement practices.

Since the Department of Defense accounts for 80 percent of all government procurement actions, it is critically important that the Department utilize the most advanced and imaginative systems for the purchase of weapon systems and other equipment. Every Member of Congress is concerned about recurrent problems at DOD—problems with spare parts procurement, with competition, with offering fair opportunities to small businesses to participate in DOD contracting, with holding down the cost of buying weapon systems, and with obtaining weapon systems that are effective and reliable.

I want to assure every Member of the Committee on Armed Services, and the public at large, that this Task Force will be looking at each of these issues energetically.

The Task Force is fortunate to have six distinguished Senators as its members. I am pleased to be joined by three fellow Republicans, each of whom has a substantial interest in these matters and a personal commitment to improve DOD procurement—Roger Jepsen of Iowa, John East of North Carolina, and Pete Wilson of California. I am pleased that Carl Levin of Michigan will serve as the Ranking Minority Member. Senator Levin is also Ranking Minority Member of the Subcommittee on Oversight of Government Management of the Committee on Government Affairs. He is the sponsor of S. 2571 and S. 2572, and has worked energetically on matters for which the Task Force is responsible. The other Democratic members of the Task Force are Jeff Bingaman of New Mexico and Alan Dixon of Illinois.

Senator LEVIN. First, Mr. Chairman, let me indicate that I also was delighted that we are digging into this subject in a comprehensive fashion. We have had a number of smaller efforts on this committee and elsewhere to really make some changes in the procurement process and open it up to more competition.

The Senator from Illinois has been very active, as I have, in the Small Business Committee. He has taken a leadership role in the small business aspect of this. I commend him for that.

I think we can make real progress today. We have a number of bills in front of us which take a comprehensive approach to the problem of procurement. Let us see if we cannot reduce cost of procurement to the Government and open it up to competition.

I look forward to marking up some of those bills in the next few days and weeks. I am glad that the chairman is on the course that he is on.

We have already heard a great deal of response to the particular bills that I introduced, particularly in the area of commercial item exception. We will be offering amendments to our own bill in that area.

We want to assure a number of folks who have talked to us about it that we have studied their written testimony and comments and through meetings with them we recognized there is a need for some type of commercial item exception in the comprehensive legislation we have introduced.

I also look forward to these hearings. I am delighted that our friend from Indiana is chairing this ad hoc task force. We worked well together and we look forward to continue to work with you.

Senator QUAYLE. Thank you.

Senator Dixon.

Senator DIXON. May I say, I appreciate very much the fact that the Armed Services Committee and this task force is beginning to discuss and to have testimony from a variety of witnesses on the entire defense procurement question.

As you know, I originally introduced S. 1730 which has 30 cosponsors and led to the introduction of S. 2489 which is principally sponsored by Senator Lowell Weicker, chairman of the Small Business Committee, and myself.

In connection with both of these bills we have had many hearings around the country and hearings in Washington.

At the markup on S. 2489 we marked up a bill that was the product of all those hearings, substantially altered from its original concept in S. 1730, and even some changes were made in S. 2489 to meet what we considered to be the major important objections of business concerns in the country.

Later on, in the course of this hearing, I intend to bring to the attention of the committee the comments made by me in the Small Business Committee where I indicated we would offer at least one more amendment, concerning the proprietary interest question which has been the major concern expressed from major businesses in the country and certainly from very fine business concerns in my State.

We want to make it very clear to those here who are going to be witnesses and will be following the progress of this bill that we intend to meet their objections on the proprietary interest question.

Senator QUAYLE. I might say to my good friend that what we might do in the course of these sessions and markup next Tuesday is to take up any amendments then.

Senator DIXON. Yes, I had offered an amendment involving three little words actually at the conclusion of the Small Business Committee hearings and the chairman asked me not to proceed with it at that time.

I indicated to this committee and on the floor that I would offer that amendment on the floor. At that time I want to call the attention of this committee to all those questions because I believe they appropriately resolve some major objections to that section of the bill in particular.

Senator LEVIN. Mr. Chairman, there is a tremendous amount of interest in this subject. It is obvious from the crowd out in the hall as well as from the reports across the country. I think that it is healthy that we open up these subjects. We get into areas that have long required our attention.

If possible, I don't know if anybody could consider having larger quarters for us. I think there are a lot of people outside.

Senator QUAYLE. That may be a constructive suggestion. It is a bit unusual for the Armed Services Committee to draw such a crowd. I believe that on issues such as this, we are unlikely to get classified information. I think we ought to discuss these issues right up front.

This is the normal Armed Services meeting room, but we can certainly take that suggestion under consideration.

Our first witnesses this morning will be Mr. Harvey J. Gordon, Assistant Deputy Under Secretary of Defense for Acquisition Management, Department of Defense, and Frank Swain, Chief Counsel for Advocacy of the Small Business Administration.

Mr. Gordon is joined by Herb Fisher, Director for Contract Policy, Department of Defense; Maj. Gen. David W. Stallings, U.S. Army, Director of Procurement and Production; Rear Adm. Joseph S. Sansone, U.S. Navy, Deputy Chief of Materiel; Brig. Gen. Bernie L. Weiss, U.S. Air Force, Director of Contracting and Manufacturing Policy; and Ray F. Chiesa, Executive Director for Contracting, Defense Logistics Agency.

Mr. Gordon, you may begin.

STATEMENT OF HARVEY J. GORDON, ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE FOR ACQUISITION MANAGEMENT, DEPARTMENT OF DEFENSE, ACCOMPANIED BY MAJ. GEN. DAVID W. STALLINGS, U.S. ARMY, DIRECTOR OF PROCUREMENT AND PRODUCTION; REAR ADM. JOSEPH S. SANSONE, U.S. NAVY, DEPUTY CHIEF OF MATERIEL; BRIG. GEN. BERNIE L. WEISS, U.S. AIR FORCE, DIRECTOR OF CONTRACTING AND MANUFACTURING POLICY; AND RAY F. CHIESA, EXECUTIVE DIRECTOR FOR CONTRACTING, DEFENSE LOGISTICS AGENCY

Mr. GORDON. Those who are with me from the Department of Defense are here if you have questions to direct to them. I will be the lead witness and I am the only one with a statement.

With your permission, I would like to ask that my statement be inserted in the record, but I would like to read selected portions of it if time permits.

Senator QUAYLE. Your full statement will be incorporated in the record.

Mr. GORDON. As you are aware, the Secretary of Defense has moved aggressively to improve policies governing the acquisition and management of spare parts. He has made it clear that permanent resolution of the spares problem is one of his top priorities. We are committed to making these improvements and institutionalizing them.

I have attached to my statement a brief summary of the actions being taken. I can only add that they are the most concerted efforts the Department has made in the last two decades to resolve the spare parts problem.

The basic purpose of the three bills we are addressing today is to reform the management and acquisition of spare parts. They are in response to real and, in some cases, perceived problems. We support the thrust of the bills because they mirror, in many respects, our own initiatives in this area.

The proposed legislation, however, not only sets certain rules on how we are to acquire supplies, but, in fact, determines how industry is to respond. We become a very special and select customer. In my view, such rules must be flexible or we may drive competent and highly capable firms from the defense market. There is already justifiable complaint from industry that the redtape in dealing with the Government is unnecessarily complex and burdensome.

The legislation also will codify a number of our spare parts policy initiatives, which we anticipate will require some revisions after we gain experience. Codification at this time will most likely result in Congress, whether it intends to or not, becoming the operative body in making regulations and revising these regulations.

We know from practical experience it is very difficult to revise statutory requirements. The proposed legislation introduces procedures and language that will require an interpretation and written guidance.

While many of the provisions of these bills track closely with our reforms, our reforms were intended to be applied judiciously and selectively. They cannot be applied in each and every case because they simply do not fit each and every case.

Procedures and language provided in these bills will undoubtedly be tested in the courts as we apply them and a new body of law will arise. Industry might well consider the provisions of these bills as the outer limits of our authority over the acquisition process.

Thus, should we later determine that additional regulation is either necessary or desirable beyond what the bills provide, we would be inhibited or severely limited in issuing such regulatory changes absent statutory revision.

In such a large and vital system as defense procurement, changes must be carefully considered or we risk jeopardizing the very mission of the Defense Department—national security. We have determined that changes are needed and they are underway, but these changes must be carefully constructed.

You should also keep in mind, when proposing changes to our procurement system, that it just changed on April 1, 1984. On this date, the Federal Acquisition Regulation [FAR] took effect after 5 years of planning and hard work.

New changes in the basic procurement law as proposed by these bills could well waste a large part of this effort and for reasons that we don't see as compelling. Just when the professional acquisition community should be settling down to operating under a new Government regulation, we may be putting it into a state of turmoil.

With all due respect, what we believe we have is a management problem and not a problem that requires legislation. This view is not ours alone.

Notwithstanding, should the committee feel impelled to press forward on legislation in this area, we earnestly believe that the principal subjects in S. 2489 dealing with technical data and breakout, if they are to be addressed, should be in the form of changes to the Armed Services Procurement Act of 1947.

We already deal with a plethora of statutes impacting on the procurement process. The Commission on Government Procurement over a decade back found over 4,000 laws having some impact on procurement. Legislative subjects that address how the procurement process is to function should be contained in a basic armed services statute.

Then, too, we prefer S. 2571 or S. 2572 over S. 2489. We believe there are some matters, largely editorial, in S. 2571 and S. 2572 that should be considered. We would be pleased to discuss these with the committee staff.

This, sir, concludes my statement.

[The prepared statement of Mr. Gordon follows:]

PREPARED STATEMENT OF HARVEY J. GORDON, ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE, RESEARCH AND ENGINEERING (ACQUISITION)

Mr. Chairman and members of the committee, I appreciate the opportunity to discuss S. 2489, the "Small Business Competition Enhancement Act of 1984"; S. 2571, The "Department of Defense Spare Parts Procurement Improvement Act of 1984"; and S. 2572, the "Defense Spare Parts Procurement Reform Act."

As you are aware, the Secretary of Defense has moved aggressively to improve policies governing the acquisition and management of spare parts. He has made it clear that permanent resolution of the spares problems is one of his top priorities. We are committed to making these improvements and institutionalizing them to assure that the Department of Defense (DOD) and the American taxpayer receive full value for the tax dollar.

The Secretary of Defense requested the Deputy Secretary of Defense, as Chairman of the Defense Council on Integrity and Management Improvement, to take the lead in providing overall guidance and coordinating the efforts of the DOD components to reform the management and acquisition of spare parts. In support of this management oversight, the principal Deputy Under Secretary of Defense for Research and Engineering has been holding bimonthly sessions with the DOD components to track their progress and to provide a forum to interchange reform techniques and approaches.

The Council has recently reviewed the status of our spare parts improvements and concluded that we have moved vigorously to improve our procedures. I have attached to this statement a brief summary of the actions being taken. I can only add that they are the most concerted efforts the Department has made in the last two decades to resolve this problem.

The basic purpose of the three bills we are addressing today is to reform the management and acquisition of spare parts. They are in response to real and, in some cases, perceived problems. We support the thrust of the bills because they mirror, in many respects, our own initiatives in this area. The proposed legislation, however, not only sets certain rules on how we are to acquire supplies but, in fact, determines how industry is to respond. We become a very special and select customer. In my view, such rules must be flexible or we may drive competent and highly capable firms from the defense market. There is already justifiable complaint from industry that the redtape in dealing with the Government is unnecessarily complex and burdensome.

The legislation will codify a number of our policy initiatives. However, we do not know that all our actions, over time, will be workable and practical. We anticipate some revisions will be necessary. Codification at this time will most likely result in Congress becoming the operative body in making regulations and revising those regulations.

We also know from practical experience how difficult it is to revise statutory requirements. Legislation such as the Davis-Bacon Act and the Service Contract Act, for example, imposed dollar thresholds that were reasonable at the time but now may not be. However, special groups have vested interests in these statutes and look upon any attempt at revision with great suspicion.

The proposed legislation introduces procedures and language that will require interpretation and written guidance. While many of the bill's provisions track closely with our reforms, our reforms are intended to be applied judiciously. They cannot be applied in each and every case because they simply do not fit each and every case. We have 15 million procurement transactions annually and buy almost all types of hardware and commodities. We have to consider the conditions of individual markets.

Procedures and language provided in these bills undoubtedly will be tested in courts as we apply them. As they are adjudicated, revisions and changes will be required in our procedures. A new body of law will likely arise. It may provide little in benefit to the effective and efficient acquisition of supplies. Industry might consider the provisions of the bills as the outer limits of our authority over the acquisition process. Thus, should we determine that additional regulations is necessary beyond what the bills provide, we would be inhibited or severely limited in issuing such regulatory changes absent statutory revision.

In such a large and vital system as defense procurement, changes must be carefully considered or we risk jeopardizing the very mission of the Defense Department—national security. We have determined that changes are needed and they are underway, but these changes must be carefully constructed. You should also keep in mind, when proposing changes to our procurement system, that it just changed on April 1, 1984. On this date, the Federal Acquisition Regulation [FAR] took effect after five years of planning and hard work.

Hundreds of people worked on the writing team to develop a simplified, uniform acquisition regulation system. We have trained almost 50,000 people in the workings of the new regulation. The private sector has invested large amounts of their own time and money to prepare for this long awaited publication. New changes in the basic procurement law, as proposed by S. 2489, may waste this effort and for reasons we do not see as compelling. Just when the professional acquistion community should be settling down to operating under a new regulation, it would be put into turmoil.

These bills are aimed at correcting alleged deficiencies in the acquisition of spare parts. With all due respect, what we have is a management problem and not a problem that requires resolution by statute. This view is not ours alone. Our IG does not see the need for legislation.

Notwithstanding, should the committee feel impelled to press forward on legislation in this area, we earnestly believe that the principal subjects in S. 2489 dealing with technical data and breakout, if they are to be addressed, should be in the form of changes to the Armed Services Procurement Act of 1947. We already deal with the plethora of statutes impacting on the procurement process. The Commission on Government Procurement over a decade back found over 4,000 laws having some impact on procurement. Legislative subjects that address how the procurement process is to function should be contained in a basic armed services statute. Then too, we prefer S. 2571 or S. 2572 over S. 2489. We believe there are some matters, largely editorial, in S. 2571 and S. 2572 that should be considered. We would be pleased to discuss these with the committee staff.

This concludes my statement and I will endeavor to answer your questions.

Enclosures.

ENCLOSURE 1.—SUMMARY OF SPARE PARTS ACQUISITION ACTIONS TAKEN BY DOD COMPONENTS

Each DOD Component has formulated, is implementing, and is giving high level management attention to a written spare parts initiatives program. As a result, the Army has undertaken 67 initiatives, the Navy 102, and the Air Force 178. The Defense Logistics Agency is substantially augmenting its existing competition and pricing programs with increased emphasis on spare parts acquisition and pricing support for the Military Services by the Defense Contract Administration Services Regions. These initiatives address the functional areas of requirements, finance and budgeting, system development and acquisition decisions on spare parts, contracting, pricing, support, resources, and equipment.

Special task teams have been established to review reprocurement data packages for currency, accuracy, and completeness. These task teams consist of engineering personnel and equipment specialists with support from legal counsel and other functional areas as required. Data rights for competitive reprocurement are being evaluated and DOD has initiated an in-depth study of acquiring reprocurement data and data rights. The breakout regulation establishes a screening procedure to review data when the annual purchase value is $10,000 or more, but DOD activities are screening parts below this threshold.

Additional resources have been assigned exclusively to value engineering tasks. Value engineering techniques applied by government personnel often reduce the cost of parts. Reverse engineering produces technical data suitable for competitive bidding for parts which otherwise are available only from a single source. Additional personnel are being assigned to this function as trained people become available. The dollar threshold for spare parts contracts to contain a value engineering incentive clause has been reduced from $100,000 to $25,000.

Procedures have been established to identify and resolve pricing anomalies and to evaluate price increases over 25 percent. Additional purchasing personnel have been assigned to analyze significant price increases, negotiate reasonable prices, and accurately justify and document the price increases. The purchase of spare parts when the price has increased by more than 25 percent within the most recent 12 month period has been prohibited unless the contracting officer certifies in writing to the Head of the Contracting Activity the price is reasonable or that national security interests require the parts be purchased.

The DOD Parts Control Program is being applied mandatorily to all new systems to enhance the use of commercial or common parts, or parts already in the inventory. This program has proven effective in eliminating potentially duplicative parts from entering the inventory. The services have been directed to have contractors identify their vendors for all parts supplied in the provisioning phase of a contract and the services may also direct vendor identification in the replenishment phase.

DOD Components have been directed to change contractor overhead cost allocation practices which result in either distorted or unreasonable prices for spare parts. Equal allocation of overhead costs among all items in a contract has been barred because this accounting practice results in distorted unit prices. Parts with a very low intrinsic value appear grossly overpriced.

Voluntary refunds have been secured, as well as suspension and debarment of offending contractors in appropriate instances. This is an ongoing initiative as instances of unrealistic prices paid come to light and are evaluated. Most cases involve legitimate accounting practices and procedures for overhead allocation but result in skewed unit prices for low dollar parts.

Use of redeterminable ordering agreements has been eliminated in most instances and significantly curtailed even when dictated by readiness and support considerations. Preferred and traditional methods of contracting are being utilized, every effort is made to definitize the price in a timely manner.

The breakout program has been strengthened by new procedures. A revised regulation with stricter procedures was issued in July 1983. Additional technical and engineering personnel have been assigned to implement the regulation. Screening and additional parts breakout is on the increase. A related initiative is the designation of competition advocates and breakout managers at all procuring activities.

Meetings have been held with defense contractors to seek mutual corrective actions. The Deputy Secretary of Defense and top service officials have communicated with top industry Chief Executive Officers. Industry has been generally responsive and has promised its cooperation.

Pricing "Hot Lines," which have been in existence for several years, have received increased emphasis. Reports of suspected overpricing receive prompt and thorough review by inventory managers in order to correct erroneous prices in the files and to resolve instances of overpricing by contractors.

The Inspector General is continuing to perform audits of spare parts acquisition. Corrective actions are being taken by the services as verified by the auditors' follow-up reviews. The Inspector General has completed its audit and issued a report on procurement of aircraft engine spare parts. In addition, the Office of Federal Procurement Policy is conducting a study of DOD spare parts policy.

Training curricula have been expanded to include both entry level training and refresher retraining for journeyman.

Personnel evaluation factors are being revised to consider the achievement of economical procurement. Greater emphasis is place on performance in keeping down costs and prices rather than achieving quantity production and speed.

Modernized automated data processing systems for logistics are being studied and planned to improve processing requirements, procurement functions and technical documentation systems. Improvements are needed in both hardware and software. Implementation will require large investments in equipment over an extended time frame.

A "model" concept program has been developed to motivate industry to achieve increased competition in subcontracting for spare parts and potentially greater opportunity for competitive breakout.

Authorization, appropriation, apportionment, budgeting, and financial management practices and regulations pertaining to the acquisition of spares are being reviewed. Changes will be incorporated in the Department of Defense Budget Guidance Manual in the 1984 revision to be published in July of this year.

The feasibility of biennial budgeting for all appropriations and programs of the Department of Defense is being studied. Acquisition of replenishment spare parts and consumable items is one of the categories being considered for the possible application of biennial budgeting.

ENCLOSURE 2.—SPARE PARTS ACQUISITION—STATUS OF IMPLEMENTATION OF ACTIONS PRESCRIBED BY SECRETARY OF DEFENSE MEMORANDUM OF AUGUST 29, 1984

NOTE.—Actions marked "Accomplished" signify the establishment of plans, policies or procedures. Implementation is an ongoing process, in some cases without finite conclusion.

Synopsis of actions	Under study	Initiated	Accomplished
Near term actions (within 90 days):			
Develop plan for resources to improve acquisition of spare parts			X
Establish procedures to apply DOD parts control program to enhance competition			X
Accelerate plans for acquisition of ADP and software for parts control program			X
Institute actions to identify disparities in spare parts prices			X
Establish procedures to employ value engineering where price exceeds value			X
Assign more engineering resources to review reprocurement data packages			X
Development test procedure for new contract incentive arrangements to encourage breakout		X	....
Establish procedures to negotiate contract data provisions, as appropriate, to reduce contractor proprietary rights in data			X
Establish procedures to designate acquisition of parts and reprocurement data as agenda item in acquisition plans, strategy panels, and review councils			X
Revise procedures for employee performance factors to include pricing, breakout, and competition accomplishments			X
Implement the procedures in DAR Supplement No. 6, Parts Breakout Program			X

Synopsis of actions	Under study	Initiated	Accomplished
Establish procedures to consider in all contracts, as appropriate, Government's ability to breakout and procure competitively			X
Establish procedures to discourage use of Government specifications and contractor engineering designs that inhibit breakout and competition			X
Establish procedures to continue action on 10-point program to insure reasonable pricing for parts			X
Establish procedures to pursue appropriate refunds for overcharges			X
Establish procedures to review existing contracts for opportunity to improve pricing, breakout, and competition			X
Issued instructions to personnel to challenge parts prices where price appears unrelated to intrinsic value			X
Mid-term actions (within 180 days):			
Reexamine policy on data rights arising under IR&D			X
Note.—Reexamination was made and it was concluded that obtaining rights to data developed under IR&D would defeat the objective of the program, degrade technology development, and discourage innovation.			
Develop plans to expand training curricula			X
Plan for task forces to review data packages for parts with high buy/quantity values			X
Evaluate and recommend changes in authorization, apportionment, budgeting, and financial management regulations pertaining to spares		X	
Pursue with Congress 2-year authorization for parts and consumables	X		
Plan for development of contract terms regarding future acquisitions that afford equitable treatment and assurance of reasonable prices			X
Long-term actions:			
Develop plans to automate data repositories			X
Develop procedures to evaluate and assess accomplishments			X

Senator QUAYLE. Mr. Swain, do you have a statement?

STATEMENT OF FRANK SWAIN, CHIEF COUNSEL FOR ADVOCACY, SMALL BUSINESS ADMINISTRATION

Mr. SWAIN. Yes, Mr. Chairman. With your permission, I would like to summarize it if you will receive the entire statement in the record.

Senator QUAYLE. Without objection, it will be incorporated in the record.

Mr. SWAIN. Thank you for the opportunity to testify today before the Armed Services Committee on this important procurement reform measure under consideration by the committee.

As you may know, Mr. Chairman, the Office of Advocacy is authorized by statute to represent the views and interests of small businesses before the Congress and Federal agencies whose policies and activities may affect small business.

I would like to state at the onset, Mr. Chairman, that my testimony here today reflects the views of the Office of Advocacy on these three pieces of proposed legislation, and not those of the administration.

However, to the extent that we support S. 2489 overall, and would like to see the legislation enacted into law, our position is largely consistent with that of the General Accounting Office and the Department of Defense Inspector General's Office as presented in testimony to the Committee on Small Business on April 6, 1984.

The Department of Defense, we understand, has expressed a clear preference for H.R. 5064/S. 2572 over S. 2489. For reasons which I now will describe to the panel, the Office of Advocacy believes that, on the whole, the process approach of S. 2489 represents the better way to solve the spare parts procurement problems which have received such extensive media attention in recent months.

Let me state the obvious, that more competitive procurement assists not only the taxpayers but small firms as well. As details in our statement indicate, to the extent that procurement is let in competitive fashion, small business receives a fairly significant portion of that, about 35 percent of that.

To the extent that procurement is sole source, small business does not get a very large percentage of sole source procurement at all. We think advocating a system which enhance competitive procurement as far as negotiated sole source procurement is good for the taxpayers and good for small firms.

This is particularly true in the area of replenishment of spare parts, where significant savings have been reported when parts are competitively procured or broken out for competition, rather than sole sourced to a prime contractor or original part manufacturer.

With the above in mind, Mr. Chairman, it seems that any good small business procurement reform measure should contain at least the following three elements:

First, elimination or reduction of obstacles to participation by small businesses in the procurement process. The issue here is the extent to which agencies should be allowed to use prequalification of sources—bidders and products—as procurement techniques.

Second, planning for ways to increase competitive procurement of spare parts and other items for future major systems before the initial production phase, and devising a system for validating proprietary data claims for items on existing contracts.

Third, an increased use of breakout procurement center representatives [BOPCR's] at major procurement centers.

Let me briefly summarize our position on these three issues, Mr. Chairman.

On the prequalification of sources, while the purpose of such a list, such as qualified bidders list and qualified parts list, may be laudable, as a practical matter, they are anticompetitive because they restrict the number of participants in procurement before solicitations are even issued.

S. 2489 does not eliminate qualified parts lists and qualified bidders lists. Rather, it gives these prequalification techniques legitimacy through statute, while at the same time imposing restrictions on their use.

We think this is a change that is worthwhile and would benefit the procurement process and benefit small firms as well.

We support these provisions in S. 2489. Unfortunately, neither of the other two bills have equivalent provisions relating to this prequalification issue.

Second, on the issue of planning for future competition and validating proprietary data claims, all three of the bills currently, the committee addressed this in different ways.

S. 2489 establishes as legal challenge for legal rights in technical data. With respect to future major weapons acquisition, the bill requires consideration of spare parts provisions as part of the technical evaluation criteria used to judge proposals both of design and production or major systems.

S. 2572 and S. 2571 take a different approach, basically rulemaking approach, including establishment of differing timeframes, contractual time limit on proprietary data.

These proposals have some merit, but we feel the total process or systems approach of S. 2489 is preferable.

This is because it is fundamental to recognize that the spare parts problem is actually a combination of many interrelated problems, and that adequate consideration must be given to competitive procurement of downstream or future requirements during the process of planning for, and awarding, design and initial production contracts for major systems.

Finally, Mr. Chairman, we do think the best way to achieve a level of checking and balancing on the issue of proprietary data claims is to incorporate better use of SP breakout of BOPCR's.

We do support S. 2489 because it includes those particular provisions.

In concluding, Mr. Chairman, while we find all three of the proposed measures currently before this committee to have merit, we feel S. 2489 is preferable because it addresses each of the three major policy goals which we have identified in the area of spare parts reform.

I also do think legislation is required. Certainly the Department of Defense is making commendable progress in both internal rulemaking and internal management procedures. It is a critical national issue.

We are currently in the midst of a significant buildup in our defense contracting and I think the time to solve the problems is now before they might become worse rather than well into the budget phase where we begin to find we have problems that we cannot resolve simply by management initiatives.

For that reason we do support legislation in general and S. 2489 in particular.

Thank you very much. I will be happy to answer any questions.

[The prepared statement of Mr. Swain follows:]

PREPARED STATEMENT OF FRANK S. SWAIN, CHIEF COUNSEL FOR ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

Mr. Chairman and panel members: Thank you for the opportunity to testify today concerning three important procurement reform measures currently being considered by this panel. They are: S. 2489, the "Small Business Competition Act of 1984," which was favorably reported out of the Senate Small Business Committee on May 8, 1984; S. 2571, the Department of Defense Spare Parts Procurement Improvement Act of 1984," introduced by Senator Levin on April 12, 1984, and referred to the Armed Services Committee; and S. 2572, the "Defense Spare Parts Procurement Reform Act," also introduced by Senator Levin on April 12 and referred to the Armed Services Committee, the text of which is that of a bill recently approved by the House Armed Services Committee (H.R. 5064).

As you may know, Mr. Chairman, the Office of Advocacy is authorized by statute to represent the views and interests of small businesses before the Congress and Federal agencies whose policies and activities may affect small business. 15 U.S.C. § 634c.

I would like to state at the onset, Mr. Chairman, that my testimony here today reflects the views of the Office of Advocacy on these three pieces of proposed legislation, and not those of the administration. However, to the extent that we support S. 2489 overall, and would like to see the legislation enacted into law, our position is largely consistent with that of the General Accounting Office and the Department of Defense Inspector General's Office as presented in testimony to the Committee on Small Business on April 6, 1984. The Department of Defense, we understand, has expressed a clear preference for H.R. 5064/S. 2572 over S. 2489. For reasons which I now will describe to the panel, the Office of Advocacy believes that, on the whole, the "process approach" of S. 2489 represents the better way to solve the spare parts procurement problems which have received such extensive media attention in recent months.

Let me begin by stating the obvious: Enhanced competitive procurement procedures benefit both the public and small businesses. According to data compiled by the Federal Procurement Data Center [FPDC], negotiated noncompetitive, or sole-source, methods of contracting accounted for almost 60 percent of FY 1980 contract dollars over $10,000. Of this amount, small businesses received only 7.2 percent. When one compares this with a 35 percent small business share of dollars obligated through formally advertised contracts, it becomes clear that small businesses benefit from more open and competitive procurements. To make the same point in another way, Mr. Chairman, data contained in the President's 1984 Report on The State of Small Business show that while small businesses received 74 percent of their contract dollars through competitive contracting methods during the fiscal year 1979-1982 period, large businesses received only 33 percent through competitive methods during the same period. Competitive procurements also benefit the public through lower costs associated with increased participation by all businesses in the procurement process. This is particularly true in the area of replenishment spare parts, where significant savings have been reported when parts are competitively procured or "broken out" for competition, rather than sole-sourced to a prime contractor of original part manufacturer.

With the above in mind, Mr. Chairman, it seems that any good small business procurement reform measure should contain at least the following three elements: (1) elimination or reduction of obstacles to participation by small businesses in the procurement process. The issue here is the extent to which agencies should be allowed to use prequalification of sources (bidders and products) as procurement techniques; (2) planning for ways to increase competitive procurement of spare parts and other items for future major systems before the initial production phase, and devising a system for validating proprietary data claims for items on existing contracts; and (3) increased use of Breakout Procurement Center Representatives [BOPCRs] at major procurement centers. Let me briefly comment on the provisions of S. 2489, H.R. 5064/S. 2572 and S. 2571 as they relate to the above objectives.

I. PREQUALIFICATION OF SOURCES

Some Federal agencies use Qualified Bidders Lists (QBL) and Qualified Products Lists (QPL) as procurement techniques for assuring quality of "critical" items. The maintenance of such lists is not currently sanctioned by statute, although QPLs do have a regulatory basis (DAR 1-1101). While the purpose of such lists may laudable, as a practical matter they are anticompetitive because they restrict the number of participants in procurements before solicitations are even issued. Such lists can thus be viewed to operate as de facto responsibility determinations (or nonresponsibility determinations for those contractors who are unable to qualify before specific purchases are made of products on lists).

S. 2489 does not eliminate QPLs and QBLs. Rather, it gives these prequalification techniques legitimacy through statute, while at the same time imposing restrictions on their use. Thus, Section 4 of the bill states that if an agency uses a prequalification requirement, it must: (a) prepare a written justification; (b) specify standards in writing that are necessary to become "qualified"; (c) promptly provide the opportunity to qualify; and (d) provide test results, including reasons for failure to qualify. In the event that the number of currently qualified sources is less than five, the bill also requires the agency to periodically advertise for additional sources through the Commerce Business Daily (CBD), and to underwrite or waive the costs of prequalification tests for small businesses ultimately determined to be qualified.

We support the above provisions of S. 2489, Mr. Chairman. Unfortunately, neither S. 2572/H.R. 5064 nor S. 2571 contain any provisions relating to prequalification of sources. While we might prefer an even more restrictive approach on use of QBLs and QPLs than that contained in S. 2489, we certainly believe that any spare parts procurement reform measure must address the prequalification issue in some way.

II. PLANNING FOR FUTURE COMPETITION AND VALIDATING PROPRIETARY DATA CLAIMS

All three bills before this committee address in different ways the important issues of government acquisition of and accessibility to technical data rights for components of major systems, and validation of proprietary data claims asserted by prime contractors.

S. 2489 addresses these issues by establishing one set of rules or procedures for existing weapon systems, and another for future major system acquisitions. Thus, with respect to existing systems, S. 2489 basically establishes a legal challenge system for reaching contractor claims of proprietary rights in technical data. With respect to future major system acquisitions, the bill requires consideration of spare parts provisioning as part of the technical evaluation critieria used to judge proposals for both the design and production of major systems.

We believe that the two-level approach of S. 2489 is a good one. S. 2572 and S. 2571 take a different approach to the technical data and related issues by basically establishing a set of rules governing the allocation of legal rights in technical data as between the Government and prime contractors. No explicit distinction is made between existing and future major systems. S. 2571 establishes a five-year contractual time limit on proprietary rights, S. 2572 a seven-year limit. S. 2571 requires government purchase of unlimited technical data rights, specified delivery times, warranty on technical data, design changes to be reflected in technical data, and a statement on the extent of a contractor's proprietary restrictions in the proposal a major system. S 2572 has very similar provisions. While the rule-oriented approaches of S. 2572 and S. 2571 may have merit, particularly with regard to establishing a set time limit on claiming proprietary rights in technical data, we feel the "process" or "total system" approach of S. 2489 is preferable. This is because it is fundamental to recognize that the "spare parts problem" is actually a combination of many interrelated problems, and that adequate cosideration must be given to competitive procurement of "downstream" or future requirements during the process of planning for, and awarding, design and initial production contracts for major systems.

III. INCREASED USE OF BREAKOUT PROCUREMENT CENTER REPRESENTATIVES [BOPCR'S]

As you know, Mr. Chairman, the Small Business Administration has a pilot Spare Parts Breakout Program currently in effect. Breakout Procurement Center Representatives (BOPCRs) have been placed at four of the Air Logistics Centers of the Air Force Logistics Command. The primary function of the BOPCRs is to identify spare parts that are being procured on a noncompetitive or sole source basis, and "breakout" these items to competition whenever possible. To date, the program has been a phenomenal success. The GAO reports that as a result of the efforts of the BOPCRs, 1,634 items were broken out at a savings of $35.8 million dollars. In a separate study, SBA showed savings of $6.7 million—38 percent—when only 181 parts were broken out for small business competition.

S. 2572 and S. 2571 make no provision for increasing the number of BOPCRs. Instead, they give the competition advocates a statutory basis. We believe that the record of accomplishment to date of the BOPCRs in saving the Government millions of dollars in the procurement of spare parts is compelling evidence of the need to place BOPCRs at all major procurement centers. Section 7 of S. 2489 would do just that, and we support it.

IV. CONCLUSION

In conclusion, Mr. Chairman, while we find all three of the proposed measures currently before this committee to have merit, we feel that S. 2489 is preferable because it addresses each of the three major policy goals which we have identified in the area of spare parts procurement reform. For this reason, we urge favorable consideration of S. 2489 by this panel and by the full committee.

This concludes my formal statement, Mr. Chairman. I would be happy to answer any questions that you or a member of the panel might have.

Senator QUAYLE. Thank you.

I think we will go ahead with the 10-minute rule and then if necessary go back to a second round.

Mr. Gordon, next week, we will move forward on S. 2489. The Small Business Committee has already reported it by unanimous vote, and there is no question that we will proceed.

Therefore, I wonder if you could outline for us the major areas of concern to DOD. I understand you and the staff have gone over with a fine tooth comb some of your recommendations.

Can you bring before this committee the major areas that you think need attention or whether you have problems with parts of S. 2489?

This task force was formed to get into these issues. I think it is important that we have your perspective. The question is what is this legislation going to look like as reported out by the task force and also by the committee?

We have 30 days sequential referral so we will be moving soon. I would like to get the benefit of your concerns regarding S. 2489.

Mr. GORDON. First and foremost, we have concern with the requirements pertaining to prequalification and QPL. I do not mean to throw statistics at you, but we have 4.2 million items in the national stock number system. Of those we have only 1,342 QPL's which cover about 100,000 items.

Senator QUAYLE. 1,342?

Mr. GORDON. 1,342 QPL's. They cover about 100,000 different items. We find that of the 100,000 different items, approximately all but 500 are competitive and that we have two or more bidders on a QPL.

In fact, in 70 percent of the cases we have five bidders on a QPL. Now, the reason why we use the QPL is that we have a part that requires special testing and evaluation for certain properties before it can be used, which is usually time consuming and expensive.

By prequalifying bidders, we are able to have effective competition, where if we do not prequalify, our requirements for delivery would usually preclude anybody but the incumbent manufacturer from building it.

The purpose of the QPL is to expand, not to diminish, effective competition. We have not abused it when you consider the numbers of QPL spare parts vis-a-vis the total parts we buy.

With respect to prequalification, this is not a QPL, but this is where we will not buy a part unless that person has previously provided the part and it has been previously tested and evaluated.

Testing and evaluation are customarily done by the prime contractor because the parts supplier is a vendor and, generally, only the prime contractor has the requisite testing capability. Out of the 4.2 million parts in the national stock number system we screen or have screened for spare parts treatment because they are above the dollar threshold, about 2.1 million. Of these 2.1 million parts, only about 200,000 require prequalification.

Of those, about 180,000 are sole source. Again, a seemingly large number, but the fact is we believe it to be reasonable when you consider that there are over three and a half million different parts in our system.

So, again, we do not think prequalification has been abused.

The provision relating to less than five being prequalified sources or products would require the Government to go to the prime contractor, irrespective of when the original testing and work was done. The prime contractor would evaluate the product and in the case of a small business, should that product pass, reimburse the cost of qualification. This would place an onerous administrative burden on us.

Senator QUAYLE. Does the bill require that?

Mr. GORDON. Yes, sir.

Senator QUAYLE. The liquidated damaged parts, you understand, are removed?

Mr. GORDON. Yes.

Senator QUAYLE. Those are not related?

Mr. GORDON. This is not related to the Government reimbursing the small business concern for the cost of conducting prequalification testing.

We find many such parts have been produced many years ago. We don't have the data for it because it was built to the contractor's specification. He conducted the testing. We don't necessarily have the test equipment. We don't have the resources to do it inhouse.

We would have to go to the prime contractor and have him qualify a new source. We don't presently have legal authority for that, so at a minimum if it were to be applied, we would like it applied prospectively.

With respect to five sources, we think we have already defined effective competition to be two or more.

If it were to be done, it should be done only where we have only one qualified source, and in those instances where we think it would be cost effective, and where the downstream requirements anticipated for this part are sufficient in quantity for the Government to be reimbursed for its initial cost.

So, we find this to be a difficult adminsitrative chore which is really addressing a relatively small problem if there is a problem at all.

Now, I do know Mr. Swain said that it is inhibitive of effective competiton because it limits competition, but to me, that is a form of special pleading because small business set-aside also has the effect of inhibiting competition, but if we have two or more qualified small businesses, we feel we have effective competition.

I would like to suggest with respect to QPL's and qualified sources, source approvals, we feel if we have two or more, we do have effective competition.

Senator QUAYLE. Are you saying that, on prequalification issue, that you can live with the concept on future contracts, but to go back and find five qualified bidders under existing contracts is too large an administrative burden? You would not have any problem with it on a prospective basis?

Mr. GORDON. I would like to state the Department's position in order of preference.

We would like to have it limited to QPL's. If the Congress sees fit not to limit it to QPL's, we would then like to see it apply prospectively in the case where there is only one qualified source.

Senator QUAYLE. One instead of five?

Mr. GORDON. One instead of five. If there is only one, we would have an obligation to bring about effective competition. That may mean two, or if, in our judgment, it meant three, we would have three.

What we could do then is, as we award new contracts, impose under the umbrella of effective competition a requirement on the major system developer to immediately qualify two or more or to get a commitment from him to qualify more than one at a later date if we so direct.

To go back and retrospectively do it means we would have to enter into third-party beneficiary contracts with each of our suppliers to undertake this work for their prospective vendors.

Senator QUAYLE. If you do it retrospectively the way this bill is set out, who pays for the testing?

Mr. GORDON. The Government would pay for the testing if it was successfully tested and the applicant was a small business.

Senator QUAYLE. The Government would pay for the testing.

Who determines the cost for that testing?

Mr. GORDON. We would have to negotiate that price with an independent testing facility or the contractor who originally qualified the source.

Senator QUAYLE. Are there any provisions in S. 2489 that require the testing to be done on a cost-effectiveness basis?

Mr. GORDON. No, sir.

Senator QUAYLE. Is that of concern to you?

Mr. GORDON. Yes; it is. We think it would be very costly, especically since many of the testing facilities that were originally used are now no longer in existence and would have to be reconstituted with high nonrecurring cost to test one particular product.

Senator QUAYLE. So, there is no mention that the testing has to be related to cost effectiveness?

Mr. GORDON. That is correct.

Senator QUAYLE. You say that determination will be made by an independent evaluation that the Government will conduct and the authors would say that a small business would pay a contractor to test his product?

Mr. GORDON. I am only a reader of the legislation and I am surely subject to interpretation, but my reading implies on the Government the obligation, if the product is successfully tested, to reimburse the applicant for the cost of testing.

This does not imply that we will only reimburse him that which we think is reasonable or that which we feel is cost effective.

Senator QUAYLE. My time is up, but before I yield, I would like to have Mr. Swain respond to the prequalification issue.

It seems to be the retroactivity that causes DOD problems.

You might also address the cost-effectiveness issue that Mr. Gordon has raised.

Mr. SWAIN. I believe the basic problem, Mr. Chairman, with QPL's and QBL's is that they are tested even before the solicitation goes out. Putting aside the issue whether it should be retroactive or prospective, first of all, I haven't been able to examine Mr. Gordon's figures, so I can't react as to the gravity of the problem from the perspective of DOD.

All I can tell you is in a lot of travels and discussions with current and potential small business vendors to the Department of Defense and prime contractors, I hear a whole lot of flack about qualified products list and qualified bidders list.

It is a subject on which my ears have been bent. It is up near the top along with a couple of others. I think it is a significant problem that needs to be dealt with in a legislative session.

Whether it is simply a protective or a current contract is a ticklish issue and perhaps needs to be discussed carefully by the committee.

As far as cost effectiveness of testing is concerned, I see no reason why the Department of Defense cannot in its wisdom and experience negotiate cost-effective testing just as it presumably negotiates for any other type of cost-effective testing of production.

I see that as a management issue, not as a statutory issue.

General **Weiss**. I would like to add two things to the discussion, sir.

The first point is that the issue of cost effectiveness is very key because the Small Business Administration does have what they call business development expense money to qualify sources.

What we are doing is looking at Department of Defense dollars, not qualified sources. I think that is very important.

The second issue is that there is also a size determination, whether a company is small or large business. The way the legislation is written all the firm has to do is certify that he is small business and you can run into many, many problems of administration in trying to resolve it.

The last point is that it projects a new philosophy between the role of the Government, the prime contractor and vendor or subcontractor.

Heretofore, the selection of subcontractors and suppliers has been the responsibility of the prime contractor and now we have entered into a partnership with the prime contractor in selection of subcontractors and vendors.

I think that is something that has to be well thought out before we charge forward in doing that kind of thing.

Senator **Quayle**. I think there continues to be a problem with small business being excluded from the process.

You are not going to get an argument from me or too many people about whether that has happened.

There are complications regarding this qualified products list and how you get on one. Whether five is the right number or whatever it may be, I do think we ought to be concerned with the retroactive issue.

I wonder if you have any statistics or predictions on whether this provision will bring down costs? If the question is retroactive, and we don't have a good handle on cost effectiveness criteria, we may increase costs dramatically.

Do you have an opinion one way or another on that issue?

Mr. **Gordon**. If I may, I consulted briefly with Mr. Fisher, my expert, and he tells me approximately 60 percent of the bidders on QPL's are already small business.

I would like you to ponder for a moment this consideration. Those small businesses made investments initially to develop a product and pay for the testing at their own expense to be put on a select list which would enhance their competitive opportunity.

Now, what we are doing is subsidizing the introduction of additional bidders to that list where we already have adequate bidders, some of those small businesses, and we are underwriting his competitors, which defeats the purpose of his original investment.

He made the effort and investment to get on that QPL because it gave him a favored competitive posture. Sixty percent of our QPL suppliers are small business.

Is it fair to those initial investors that these Johnny-come-latelies are going to have their costs reimbursed by the Government?

Senator Quayle. I think what we are talking about is opening the door and getting more access for them.

I am just trying to look at the total cost. Obviously, if we get more competition, the cost will most likely come down. The more sources you have who are able to manufacture these products, the better off you are going to be. You are going to be able to pick and choose.

I have seen a lot of contracts negotiated quickly when they see somebody on the horizon able to make a better widget. From a management point of view, the more the merrier.

Still, we don't want to run afoul and make competition counterproductive.

Mr. Swain. Mr. Chairman, I don't want to take the committee's time, but I disagree severely and fundamentally with a couple of things that the General has said, but I do agree with him on one thing.

That is in this legislation the committee is looking into the relationship between a prime contractor and a subcontractor. There is no question about that.

I think there is no question about the necessity of doing that. We would not have had the public instances of problems that we have had if the Department of Defense had had a better handle on purchasing parts, either directly or indirectly from many of the subs.

That is exactly what we are trying to do. We are trying to achieve more competition. I agree with him it is a little bit of a different step, but I think it is an absolutely necessary step driven by the concerns of the taxpaying public and driven also by concerns of small businesses that want to get in, not only to make money for themselves, but obviously, to make the system more competitive.

I have several reactions to what Mr. Gordon has said, but I don't want to take the time of the committee to get into that.

Senator Quayle. Will you let us know later?

Mr. Swain. Yes, sir, I will give you a written followup.

Mr. Gordon. Do you wish me to continue with other problems that we have with the bills?

Senator Quayle. I will get to some of the other problems. I am going to try to observe as closely as possible the 10-minute rule.

Senator Levin. How long will your list of problems take?

Mr. Gordon. Five minutes.

Senator Levin. I think it is important that we follow the course the chairman has set in getting them to identify specifically all the problems in the bill. I hate to use my time for it, but it is so important that we do it that I think I would like you to continue along that line.

If it takes more than 5 minutes of my time, I may ask to have you put the remainder in the record.

Mr. Gordon. We have some concern about the requirements of the bill pertaining to the amount of information to be put in the Commerce Business Daily. We view the Commerce Business Daily's principal strengths as being relatively inexpensive, readily available, and manageably sized.

I have a copy of one with me. A contractor can subscribe for $160 a year and find out what is going on. He gets one every day.

The bills requirements would appreciably increase the size of this, the cost of it, and the ability to publish it in a timely fashion with timely information. To that extent, we think it will be self-limiting.

The information which is requested is appropriate for that one individual who is interested in that particular procurement and should be made available.

Whether or not we should print all that information on every possible procurement and every solicitation, we think will make it encyclopedic in size and be self-limiting.

The other concern we have is that at the present time we require the posting of all solicitations over $5,000 and we do not prohibit, but we do not require, the posting of solicitations under $5,000.

This bill would require the posting of all solicitations at any dollar amount where otherwise they would have been synopsized in the Commerce Business Daily but for the dollar limitation.

We will be, literally, wallpapering the walls with millions of notices. Now, that can be done. The point is, is that not self-limiting where there is such an abundance of information that the person cannot manageably deal with it and make use of it?

We think it is not cost effective and we don't think it will well serve its intended purpose.

Now, we are in accord with the general concept of major systems production contracts containing appropriate provisions relating to technical data. We have some minor technical concerns with this.

We honestly believe, and there is some difference of opinion among my colleagues as to the scope of the problem, only about 3 to 4 percent of the problem is buying rights in data. We think about 25 percent of the problem is our inability to find and redistribute the data we have.

We are presently investing $144 million over the next 5 years in automating our data repositories. We are thinking about another $40 million in software for engineering data indexing which will relate components to the next higher and next lower set of things.

This is a problem that you are not going to legislate away. We don't think that what you are focusing on, which is our ability to buy limited rights in data, is really where the payoff is.

The payoff will be in our ability to find the data we have and to then use it in a timely and effective manner.

As to buying rights in data, there is much difference between limited and unlimited rights. I do not want to buy unlimited rights for the entire B-1. I may want rights in data to buy select parts on the B-1 from anybody so long as I plan to continue to use those parts in a B-1.

So, we have some concerns with the Congress' intention. If your intention is do something more intelligent and preclude posture where lack of appropriate data inhibits the opportunity to become cost competitive, we agree with that, but we do have some minor problems.

We have a problem about the milestone dates your have given us for coming in with solutions to the data management problem. We think we can develop a plan, we are working on a plan, but I honestly don't believe I can say with confidence and integrity that within 3 or 4 or 5 years we will have every piece of data reviewed, every piece of data indexed and everything on the computer.

It is going to take us 5 years just to complete automation. We have 200 million items of data and we add to it at the rate of anywhere from 17,000 to 20,000 items a month. It is a big job.

We would like to see the obligation to proceed and report and monitor our progress, but not finite dates.

As far as the breakout procurement center representatives, we don't object to SBA getting involved and we don't object to their having technical people. We think the technical people should be SBA's though.

It is difficult for us to provide our personal resources and make their working for SBA their primary responsibility. A man cannot live in a house divided. He owes allegiance to one or the other.

We are doing a lot of work that SBA would like to do themselves because it is in our self-interest. We do not have any objection to that concept, but we would like to see them provide their own engineers as technical advisers.

We have some problems with definitions. Definitions are always tough and we would like to have it left to regulatory authority to come up with appropriate definitions. We don't have a desire to circumvent the intent of Congress. It is just that we deal with a lexicon of our own and we always have problems with definitions.

I thank you, sir, for your time.

Senator LEVIN. Mr. Chairman, I wonder if we could get an analysis like that for the record on the other two bills in front of us?

Mr. GORDON. We will provide you with that.

[The information follows:]

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, DC, October 1, 1984.

Hon. JOHN TOWER,
Chairman, Armed Services Committee,
U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of the Department of Defense on S. 2571 (Department of Defense Spare Parts Procurement Improvement Act of 1984), 98th Congress, a bill "to amend title 10, United States Code, to improve the procedures for procurement of technical data and spare parts by the Department of Defense, and for other purposes."

The proposed bill would amend title 10, United States Code, to: Require the Department of Defense [DOD] to acquire unlimited rights in technical data except when it is not economically advantageous to do so as when the price demanded by the contractor possessing such rights is too high or additional future quantities are not likely to be required; place responsibility on contractors to update data already delivered to the government whenever an engineering design change is made; require contractors to certify that data provided the government is complete, accurate, and adequate, require corrective action if it is not, and prohibit the making of progress payments to a contractor during any period that a contractor is not in compliance with these requirements; limit a contractor's proprietary interest in technical data to a period of 5 years unless the head of the agency, for good cause, agrees to a longer period; require advocates for competition to review all existing proprietary interest designations within a 4-year period of time and either require the removal of such designations when the competition advocate feels they are inappropriate or take action to remove the designation within 17 years if they are found to be appropriate; require contractors to state, as part of their offer, the extent of proprietary interest in property to be provided and requires this to be considered in award decisions; direct the Secretary of Defense to develop regulations concerning prices to be negotiated for supplies acquired from contractors who do not produce or add significant value to the supplies; call for the marking of property or including in all technical data, the name of the contractor or vendor, and its stock number; reduce the threshold for certified cost or pricing data from $500,000 to $100,000; provide for the establishment of advocates for competition; and require that the government acquire needed property only in economic order quantities and require that solicitations ask contractors to provide advice on what would be the most economic order quantities.

The DOD is acutely aware of the need to improve the management and acquisition of spare parts. The Secretary of Defense in his memoranda of July 25 and August 29, 1983, directed a number of actions be taken to reform the acquisition of spare parts. These actions and subsequent guidance include: the use of standard or commercial parts in weapon systems; enhancing competition; the designation and duties of competition advocates; identification of actual manufacturers and producers; most favored customer pricing assurance clauses; limiting the award of contracts for items experiencing price increases of 25 percent or more; intensifying cost consciousness and determination of fair and reasonable prices; testing alternative approaches to expanding rights in technical data; aggressively pursuing refunds where appropriate; revising performance evaluation factors for acquisition and logistics managers to include emphasis on pricing, breakout, competition and value engineering; accelerating the improvement and automation of repositories for reprocurement and technical data; mandating use of value-based cost allocations methods to assure parts prices are in line with their value; implementing a "model concept" in the acquisition of military systems to motivate industry to achieve a more competitive environment for spare parts; and, to harness the expertise of all defense suppliers, use of value engineering incentive clauses in contracts for spare parts and repair kits.

The DOD supports the thrust of S. 2571 because its provisions parallel a number of initiatives taken by the Department to reform the acquisition of spare parts. However, many of our initiatives are well under a year old, and to a large extent, unproven under the test of time as to both soundness and workability.

Flexibility is a critical component of any program seeking solutions to diverse problems within a multibillion dollar enterprise. Management problems, therefore, should first be addressed with management solutions. While we firmly believe that we have launched a program that is installing appropriate solutions through our regulatory process, we do not know that all of our reforms, over time, will be workable and practical. We anticipate that some revisions will be necessary. As this bill would codify a number of our management solutions, it may well result in Congress becoming the operative body in making regulations and revising these regulations. Accordingly, we view S. 2571 as premature and potentially limiting the range and measure of possible institutional corrections.

Based on the foregoing, and notwithstanding our support for the thrust of this bill, we believe enactment of S. 2571 could adversely affect our ability to readily react to the need of major adjustments in Defense management and in business policies and practices.

Sincerely,

CHAPMAN B. COX.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, DC, October 1, 1984.

Hon. JOHN TOWER,
Chairman, Armed Services Committee,
U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of the Department of Defense on S. 2572, 98th Congress, a bill "To amend title 10, United States Code, to provide for more cost effective and efficient purchases of spare parts by the Department of Defense, and for other purposes.

The proposed bill would amend title 10, United States Code, for the purposes of (i) requiring source identification of property and technical data whenever practicable,

(ii) prohibiting prime contractors from unreasonably restricting direct sales to the government, except as otherwise lawful, (iii) establishing certain definitions, (iv) establishing prepurchase administrative requirements, (v) requiring regulations to require offerors to identify whether technical data will be provided with unlimited rights or at all, and to consider same in source selections, (vi) providing circumstances for which the United States shall have unlimited rights in technical data or computer software, (vii) requiring contractors to have approved data management systems, prior to delivery of techinical data, (viii) establishing authority to ignore, after 60 days notice, unsubstantiated restrictions on data or computer software not authorized by a contract, and where unsubstantiated, a contractor would pay the government's costs of contest, provided, assertion is made within three years from final payment unless otherwise provided in the contract, (ix) providing that notwithstanding inspection and acceptance of technical data, contractors shall warrant, in the contract, for the period specified, conformity with specifications and other requirements of the contract, or the contractor will correct to conform, (x) requiring the Secretary of Defense to establish regulatory standards for determining whether contracts shall have a provision, dating for expiration, contractor and subcontractor (any tier) rights in all technhical data, not to exceed seven years from date of required delivery of data, or related item, whichever is earlier, (xi) requiring agency and procuring activity competition advocates together with their duties and powers, (xii) requiring an annual report to Congress on replenishment parts management and rates of competition by both number and value of contracts, and (xiii) providing that any regulation prescribed by the Secretary of Defense or the Secretary of a Military Department under chapter 137, title 10, United States Code, not take effect until 30 days after publication in the Federal Register for public comment.

In addition, the proposed legislation provides Congressional findings and policy direction regarding the Department of Defense's spare parts reform activities and requires a data management and acquisition plan within one year and its implementation within five years.

The Department of Defense is intensely aware of its obligation to restore credibility to its spare parts management and acquisition programs. Accordingly, awareness has been matched with equally intense activity to seek and make permanent required changes to both policies and procedures. With their genesis in the Secretary of Defense's memorandum of July 25 and August 29, 1983, directives have been issued on: the use of standard or commercial parts in weapon systems; enhancing competition; the designation and duties of competition advocates; identification of actual manufacturers and producers; most favored customer pricing assurance clauses; limiting the award of contracts for items experiencing price increases of 25 percent or more; intensifying cost consciousness and determinations of fair and reasonable prices; testing alternative approaches to expanding rights in technical data; aggressively pursuing refunds where appropriate; revising performance evaluation factors for acquisition and logistics managers to include emphasis on pricing, breakout, competition and value engineering; accelerating the improvement and automation of repositories for reprocurement and technical data; establishing reports on the number and value of competitive, actual manufacturer and prime contractor replenishment part purchases; mandating value-based cost allocations to assure bottom-line parts prices and significantly more inline with intrinsic values; implementing a "model concept" in the acquisition of military systems to motivate industry to achieve a more competitive environment for spare parts; and, to harness the expertise of all defense suppliers, use of value engineering incentive clauses in contracts for spare parts and repair kits.

The Department of Defense supports the thrust of S. 2572 because its provisions generally reflect the Department's own views. Current Departmental initiatives substantially parallel many of the implementing activities that might be required were S. 2572 enacted. Many Departmental initiatives, however, are well under a year old, and to a large extent, uproven under the test of time as to both soundness and workability.

Inherent in the management directives of the Secretary of Defense in his memorandums of July 25 and August 29, 1983, is flexibility. Adjustments, refinements, even complete redirectioning of Departmental initiatives are immediately possible. To us, flexibility is a critical component of any program seeking solutions to diverse problems within a multibillion dollar enterprise. Management problems, therefore, should first be addressed with management solutions. While we firmly believe that we have launched a program that is installing appropriate solutions, some major areas remain under study, e.g., rights in data. There are ongoing additional audits and investigations, each of which may ultimately influence the institutional solutions, perhaps substantially. Additional corrective actions or refinements to existing policies or directives will flow from the Secretary of Defense's standing mandates for decisive action. Of necessity, therefore, we view S. 2572 as premature and potentially limiting the range and measure of possible institutional corrections.

We fear that enactment of this bill could establish constraints on the Department's ability to reasonably set the obligations and liabilities of the private sector when they are a party to a Defense contract. Codifying existing regulatory criteria and principles forecloses the Department's ability to readily adjust them, and presumes that ongoing studies and reviews will ratify their institutional appropriateness. We believe that legislation should preserve our authority to seek and apply a variety of measured solutions. Perhaps even more important, we especially would not like legislation that industry could view as being the upper limit of their liabilities and obligations to the government and, thereby, have it used against us in meaningful negotiations. We believe these points aptly reinforce a view that legislative solutions to management problems should be neither desired nor sought.

Based on the foregoing, and notwithstanding our support for the thrust of this bill, we believe enactment of S. 2572 at this time could hinder our ability to institutionalize major adjustments in Defense management and in business policies and practices. We would be pleased to discuss our views at any time.

Sincerely,

CHAPMAN B. COX.

Senator LEVIN. One of the important points that I think should be made here is that these bills for the most part are consistent with each other. These are not competing with each other for being marked up or passed or anything else.

There are a few provisions which go in different directions in a couple of areas. This is not an either/or thing.

I am addressing this to you, Mr. Swain, particularly. You can very well support all bills, all three of them, as a matter of fact, even though the last two are really two alternate ways of getting those jobs done.

The small business bill that Senator Dixon has consponsored and is chief sponsor of is really very consistent with these other two bills.

My question to you, Mr. Swain, is this: Assuming that I am right that the bills are consistent with each other, do you have any objection then to the passage of the more comprehensive bills, S. 2571 and S. 2572?

Mr. SWAIN. As my statement suggests, S. 2489 contains some sections that really are not treated in S. 2572 and vice versa.

The one issue in S. 2571 and S. 2572 which is apparently provoking some considerable discussion within the small business community is the provision in those two proposals which would set a time limit for release to the general public of their rights.

We have heard from people on both sides of that issue. There are small firms that sell to the Department of Defense and other agencies now that would prefer not to have their data released, obviously, except under certain circumstances, not an automatic release date.

I think some of the following witnesses will address that point.

Senator LEVIN. Let me assume we mark up and send to the floor S. 2489 and we are now addressing S. 2571 and S. 2572. Other than one question you have just identified, would you support the provisions of S. 2571 and S. 2572?

Mr. SWAIN. In addition to S. 2489, not necessarily the substitute for it.

Senator **Levin**. That is what I say. We have taken care of S. 2489 and in addition, would you support it except for that one issue of data rights?

Mr. **Swain**. Yes, sir.

Senator **Levin**. Assuming we have taken care of S. 2489, whether you like it or not, we have marked it up, sent it to the floor and the Senate passes it, what is your position on S. 2571 and S. 2572?

Mr. **Gordon**. We generally support the thrust of those bills.

I am sorry you asked me because I know how you feel about this, but we are still opposed to the lowering of the threshold of cost certification of pricing data to $100,000.

Quite frankly, for spare parts we identify the problem at the level of substantially lower priced items. We don't really think that lowering the threshold or raising the threshold touches on the spare parts problem at all.

Nor do we think that Congress is correct in assuming that just because we don't require certification means we don't normally get cost and pricing data below $100,000 and we never conduct audits below $500,000.

I think Mr. Anglis has testified to that effect before the Senate and you understand that.

There is some confusion in S. 2571 as to withholding of progress payments. We would feel more comfortable if it were confined to the instant contract. The provision is now susceptible to being construed to withholding of progress payments on all the contracts they may have with the Government, not just the instant contract.

We are concerned about whether or not it really anticipates the obligation on the part of the Government to pay consideration to a contractor who properly asserts a vested property right in data.

It suggests at the end of a certain time the data becomes the Government's. That should be the case perhaps, but only if the Government pays consideration for that which is properly the contractor's data.

We have some concern about contractor warranties on data. It is very difficult to warrant that anybody using that data may be able to make effective use of it. We think we can develop specifications or objective standards which data should meet.

If it fails to meet those, we have no problem with making him do it again. But we are concerned with the test being that anybody the Government may ultimately select to be a contractor should be able to make constructive and effective use of the data.

We would very much like to see the authority or the flexibility to have deviations because we can visualize there are some contractors wherein for all their equipment, commercial and military, they use data which is so basic and fundamental to their industry position that they would never sell it at any time at any cost and we may drive them out of the industrial base.

So, there may be instances where data is simply not available at any price at any time and the choice you are giving the contractor is to leave the industrial base or to forfeit or abdicate his industry position.

In general, we do not have a concern with that except limiting——

Senator **Levin**. When you say "with that"——

Mr. **Gordon**. The bill in general.

Senator **Levin**. S. 2571 or S. 2572, either one?

Mr. **Gordon**. Yes. We have some difficulty in asking a contractor to certify that any data he has not identified will thereafter be the Government's data because frequently at the time of the initial contract he does not know the precise technologies he may have to employ to solve problems or the subcontractors he may yet use.

We would like to have a provision which we presently have in our regulation which provides for a saving period. If within 6 months he can come in and demonstrate with preponderance of evidence that he made a mistake and that he failed to limit data in an area where he had a proper right to limit data, we will retroactively let him go back and correct that.

Senator **Levin**. You would recommend that we allow for that?

Mr. **Gordon**. Yes. Some savings period to allow for the possibility that he can make an honest error.

In S. 2572, which is essentially the Senate version of the Nichols bill, there are some definitional problems which it creates and we really think it establishes regulations, not a broad legislative basis for regulation. We also would like to have more flexibility because it is going to be hard to change if change becomes appropriate.

Senator **Levin**. On S. 2572 if you could submit your other comments on that bill for the record, I would appreciate it. But as far as S. 2571 is concerned, you have gone through the problems you have with it.

Mr. **Gordon**. Yes, sir. We have these comments. They have not yet been cleared through the Executive Office of the President, which is customary, and the Department of Defense, to be formally submitted. I will be happy to make a copy of my notes from my book which I have used to synopsize our concerns.

It would not be the formal comment of the Department of Defense.

Senator **Levin**. That would be very helpful.

How long would it take for those formal comments?

Mr. **Gordon**. Formal comments or comments from my book?

Senator **Levin**. Formal.

Mr. **Gordon**. I have no way of predicting that. All I can says is you can have copies of my notes before I leave the room.

Senator **Levin**. Can we expect to have some more formal comments in a week?

Mr. **Gordon**. I will so advise our legislative people and they will endeavor to make that happen.

Senator **Quayle**. I might just say that it will be helpful to get as much comment as possible in a short period of time because we will be marking up S. 2489 soon.

[See letter to Senator John Tower from Chapman B. Cox, of Oct. 1, 1984, p. 80.]

Senator **Levin**. In the areas where there are overlaps, there are just a few areas in both bills, but I think we ought to use S. 2489 as the vehicle. We ought to get your comments as quickly as we can.

On the other part, S. 2571, most of S. 2571 we have your informal comments which are helpful and very supportive generally.

I must tell you that your comments are very reasonable to me. I don't have any problem, by the way, in allowing retroactive return to representation by a contractor in the event of an honest error.

I don't mind the contractor saying, "I made a mistake," and let him persuade you that it was an honest error. It happens all the time. That does not particularly trouble me.

On the other areas, without repeating what you have said, it seems to me to be a reasonable response. I am not necessarily agreeing with every specific part of it. I have to think in general it does represent a reasonable response and I am glad to hear you are generally supportive of S. 2571.

Now, on the threshold issue we have gotten testimony very supportive going back to the original $100,000 threshold. That testimony was received at the TACOM facility in Warren, MI.

I think that record should be made available to this subcommittee.

My time is up. I see I have a number of other questions for Mr. Gordon and Mr. Swain on my second round.

[See, Army Procurement Practices, hearing before the Subcommittee on Preparedness, held in Warren, MI, April 18, 1984; Senate hearing 98-933, 40 pps.]

Senator QUAYLE. Senator Dixon?

Senator DIXON. Thank you, Mr. Chairman.

Mr. Swain, I notice one of the things Mr. Gordon addressed in his remarks was his suggestion that he believes the principal subjects in S. 2489 dealing in particular with technical data and the breakout question, if they are to be addressed, or should be in the form of changes in the Armed Services Procurement Act of 1947.

I would like your response to that.

Mr. SWAIN. I don't have a particularly informed response to that, Mr. Chairman.

I think it is well known that the Department of Defense is sensitive to the fact that the committees are not necessarily expert in Defense Department matters and sometimes get involved in impinging on their operations.

I can say that I have discussed the matter with Under Secretary Taft and he has expressed to me a clear interest in having it go through the Armed Services Committee and the armed services procurement statute.

The bottom line is the small business community and my office would like to be oriented. If we can achieve the same reforms, whether it is the armed services procurement rules or other procurement rules, what we are interested in is basic performance.

I am not a bright enough procurement person to spot the differences that one may make between the two statutes. If there are significant differences, I would like the opportunity to comment to you at a later time.

Senator DIXON. I would appreciate your supplying your thoughtful analysis of it at your leisure in the near future.

Mr. Gordon, could you enlighten the committee as to why you take the position if this is to be done, what is to be accomplished should be as changes to the Armed Services Procurement Act of 1947?

Mr. GORDON. It is not so much this particular bill as it is the fact that in this session of Congress there are over 140 pieces of legislation that you have been addressed that all directly affect procurement. They have been from a multitude of committees, from a multitude of perspectives.

We have no assurance that they have been in any way integrated or assessed or considered in terms of intended or unintended collateral effects. We have already 4,000 laws which affect procurement.

When we write our regulations—and the man in the field looks at one book—we would like to have the body of law that governs our processes and our policies in one basic statute so that at least when changes are considered or new initiatives proposed, they are viewed and considered in context and with regard for their collateral effects.

We have problems where one law tells us to do something which has an adverse effect on another law sponsored by another committee.

I guess it is just a plea for the working level for me to say it would make life easier if somehow we could get our act together.

Senator DIXON. You touched a little bit on the Breakout Procurement Center question and the question of the CPC representatives. I believe there are four breakout procurement centers right now.

Is that correct?

Mr. GORDON. I don't honestly know, sir.

Senator DIXON. Can anybody help me with that?

Mr. GORDON. Yes, four under the experimental test.

Senator DIXON. Would you say that the work they have been doing in the past has been generally successful?

Is there evidence they have saved money in the work they have done?

Mr. GORDON. I do not know.

I do know, based on our experience with competition advocates who are performing very similar tasks in every major procuring activity, we have found the return on that investment to be very good. We have found the products and the efforts of our competition advocates to be very effective.

To the extent we are considering something like that, we really cannot object to it. All we are saying is that we are using our resources to support our competition advocates. They are doing essentially what this legislation would mandate SBA to do. And then it tells SBA to use our personnel resources in doing it.

That is what bothers us, not the intent.

[Additional information follows:]

BREAKOUT PROCUREMENT CENTER

In late 1979 SBA initiated a test program to increase its efforts to maximize potential opportunities for small businesses to Defense contracts. "Breakout Procurement Center Representatives (PCR)" were assigned to the Air Logistics Centers (ALCs) at Oklahoma City, San Antonio, and Warner Robins. A Breakout PCR has subsequently been assigned to the ALC at Ogden, Utah. A GAO report entitled "SBA's Breakout Efforts Increase Competitive Procurements at Air Logistics Centers" concludes that SBA's breakout efforts have resulted in large dollar savings in relation to the programs costs.

Senator DIXON. The essential intent of the legislation is to broaden the scope to provide, instead of 4, would ultimately be about 40 for the 40 major procurement centers in the country. That initiative, if it saves money as to each of those, is a position you have no quarrel with?

Mr. GORDON. No, except I believe based upon what we have done through management initiatives, it would be redundant.

Senator DIXON. We have not said too much about the proprietary interest question with respect to technical data.

Have your folks and you thoroughly examined what we provide in this final bill which has been marked up in the Small Business Committee and do you have problems with any of the suggested language in there?

May I say to you that I said in the committee hearing immediately prior to markup that I was going to insert some additional language on page 28, after the word "specified," the words "and paid for".

Senator QUAYLE. What line are you on?

Senator DIXON. Wait a minute. We have a problem, a change in the bill, Mr. Chairman. Let me find that place.

Line 12 on page 29 after the word "specified," we will insert and I will offer at the appropriate time an amendment, the words "and paid for".

Mr. GORDON. I am sorry, sir, I don't have the same copy that you are reading from.

We would hope we would be able to continue to work with the committee on our suggested changes.

Senator DIXON. Let me say what I would appreciate hearing from you and your associates about is the language we employ with respect to technical data and proprietary interest in this legislation.

Should you have any problems with that, I would greatly appreciate hearing from you or I would appreciate suggested changes that I think are appropriate.

I am not indicating to you that some have suggested, among businesses that are concerned about this, that, Mr. Chairman, instead of "and paid for," we might provide "and directly funded".

Mr. GORDON. I think they were properly addressing their concerns about IR&D the government funds and pays directly. The government gets no data rights. They were concerned should the legislation be read as abrogating that policy and giving the Government data rights on all work developed under IR&D funding.

We have no intention to change that policy.

Senator DIXON. You shared your concerns with the group that suggested changes be made?

Mr. GORDON. That the Government should have rights to data that it directly funds, yes.

Senator DIXON. Mr. Swain, getting back to the whole question of prequalification of sources, what do you suggest as the policy we ought to follow in this bill to expand the competitive opportunity among small businesses in view of the objections that Mr. Gordon previously indicated about the five requirement?

Mr. SWAIN. I would suggest, Mr. Chairman, that the committee discuss in detail the issue of prospective or retroactive. That is an important issue and needs to be worked through.

As far as the five requirement is concerned, I am not sure five is the magic number, but I will say one is not the magic number.

Senator Dixon. I think we all agree with that.

Mr. Swain. That leaves us with three, doesn't it?

I think that if you are going to use qualified products or qualified bidders list, and we all now this would justify the use of those lists under certain conditions, then we ought to make sure the list does not act as a disincentive to competition as the final result.

From my perspective as a small business advocate, we would like to see the list used as little as possible. Or let me put it in a positive sense, we would like to make sure when the list is used, there is no impact on competition.

I will advocate for the number contained in the current bill which is five.

Senator Dixon. I have no further questions, Mr. Chairman.

Thank you.

Senator Quayle. Let me follow up again on this. I think it is one of the major issues, if not the major issue, prequalification issue, how we should deal with it.

Mr. Swain, if we were to take that prequalification issue and apply it and pick out a number, if you want, on a prospective basis and then on the retroactive and the one we have on line, what would be your response to moving in a direction that we ought to go ahead with trying to get, say, whatever that number would be, two or three additional sources on the list if in fact, and this is going to be arbitrary, but certainly DOD can read what we are trying to do and we can put it in the report language to get this point through, if in fact it is cost effective and gives them on a retroactive basis some sort of discretion rather than have it mandated that all contracts are presently in existence are going to have to be moved.

Now would you comment on that possibility that somewhere in between trying to finesse, the retroactive as well——

Mr. Swain. S. 2489 contains several conditions which would permit use of QPL's and QBL's. Most of the discussion this morning focused on the retroactive issue and issue of paying for the cost.

There are two or three other conditions which would require written justifications in those instances with certain public notice. I see no right of public and the public notice provision should not be applied immediately. They don't impinge on contract rights or investment in testing.

Senator Quayle. That would be sort of prospective, the determination how you define prospective.

If you don't have contract rights, now, you are looking at contracts to be negotiated in the future, this new language would be applicable.

What we are looking at are the ones in the contract, the things that are ongoing right now. That seems to be the hangup.

Mr. Swain. It seems to me if there is a new buy of a product which is subject to a qualified product and qualified buyer list, I see no reason why there ought not to be public notice as called for in the proposal in S. 2489.

There ought to be some public justification and notice that such a list exists and how one goes about getting on that list.

Senator QUAYLE. You would have no objection to that, Mr. Gordon, would you?

Mr. GORDON. I think we have to really separate the subject because Frank is speaking about QPL's and engineering source approvals as if they were one and the same.

With respect to QPL's, we think you have a solution looking for a problem, because we already have authority and we already do pay for testing when we determine it is cost effective and in our interest to develop additional sources to be put on the QPL.

We don't use the QPL to limit competition. We use it to expand competition because when we have a difficult item to buy, with a limited industrial base, we want to encourage additional vendors so that we can get effective competition and still meet our delivery requirement.

On the engineering source approval, there the problem is that the guy who originally designed and developed the item only went to one source or a limited number of sources for a component. He went through a very difficult time teaching them how to build it, letting them use his facilities, his test equipment, his manufacturing techniques.

He got the item and he tested it and evaluated it and gave it a stamp of approval. What he is saying to the Government is, "When you buy this item, you can buy this item from me or from him, but if you buy it from somebody else, I cannot certify that it is a good part."

Now, to the extent we have those, we have about 146,000 where we are sole source. There is no way to go back easily and change that.

I don't accept the argument that you need five. I think you need two or more, excluding the prime contractor, because that is how we always define effective competition.

For some of those items there aren't more than two suppliers in the whole world, let alone in the country. I think that if you would direct that the Department of Defense should encourage and should reimburse small business for the cost of testing in order to achieve competition, this should be when it is cost effective.

Prospectively, we can do it because we can put it into our development contract. In fact, we now have a model concept in which we are going to pay, separately, as a line item in our development contract, prime contractors to go out and expand their vendor base of qualified suppliers. We propose to pay them a continuing fee to make sure manufacturing techniques and data are current so that we can break out and procure directly and competitively early on in the acquisition process.

So, we are moving in this direction.

If you are going to legislate, and that is your prerogative, don't make it such that we cannot manage it effectively and we don't have the flexibility. That is all we are debating here. Not whether you should, but how.

Senator QUAYLE. I think the question is how. It is not the question of should.

You agree and you think you can do it on your own. I think the issue on prequalification we will get into later. We still want to enhance and I think if you can do it prospectively and you say there is no problem prospectively, I can understand the problem applying the same rules prospectively on a retroactive basis, I can understand that.

I think there is somewhere in between, some language or something that can be done on a retroactive basis, to encourage, where in fact it would be feasible and possible. That is what I am searching for.

Admiral **Sansone**. Mr. Chairman, the issue of prequalification, as Harvey is trying to distinquish between qualified product source and prequalification, that issue of prequalification goes right down to the source control drawings by the contractor where he lists his mandatory source, the only source that he has used in achieving the drawing identifying this part.

Contrast that with a specification control drawing where a vendor does list his suggested proof of vendor.

If we were to retroactively go back and apply to all of those sole control drawings the concept of expanding that prequalified list, we would be expanding it from one to a number, and I certainly support two or more, but the thousands and thousands of sole control drawings that would have to be changed to develop additional sources, No. 1, the administrative burden, in my view, is not substantial.

No. 2, the cost of development of those sources retrospectively is going to be very difficult.

In the Navy we have this whole problem being dealt with on a basis of breakout and competition for breakout and breakout to direct OEM's [original equipment manufacturers] with the concurrence of the prime contractors.

I think on the prequalification aspect you are zeroing in, sir, on the very key issue.

Senator **Quayle**. If you take the prequalification, to go back to Mr. Swain's point, it you make a new purchase, maybe that could be applicable, particularly if it can be shown to be cost effective. Another way, although it is retroactive to some degree, it is also prospective to some degree because you are going with an additional purchase.

You would not go back to an existing contract, but if you are going to have a new contract with DOD and people say you only had one the last time, then you would open it up. I think it is advisable, and I don't think we should mandate it, but I don't want to yield very much flexibility on this.

Senator **Dixon**. That is the point going out with the same contract again for acquisition.

Senator **Quayle**. Yes. You can say, look, you only had one source the last time. This time we want you to have two or more, at least two, maybe three, whatever we decide to include. You can use your judgment on the cost-effectiveness aspects.

The part we are talking about is a very expensive part. We know the testing is going to cost *x* amount. There might be some sort of in between position to deal with this problem.

Mr. **Gordon**. May I ask the Senator a question?

Senator **Quayle**. Yes.

Mr. **Gordon**. Would we be permitted to proceed with the instant procurement and not have to stop awaiting receipt of proposals from industry as to someone who might then wish to develop a tested product because it could take 2 years to go through this process?

Senator **Quayle**. That is a judgment call. We are not going to slow down the pipeline. If it is something that will take 2 years, that is something fairly major.

Mr. **Gordon**. For someone to build a product, submit it, get it tested and evaluate the results would be time consuming. We would not like to have to be obliged to not reprocure pending the completion of that.

I think we can live with the obligation, synopsize the fact that we are seeking additional sources.

Senator **Dixon**. May I read from page 8 of the bill, line 6 through line 9:

> A Federal agency need not delay a procurement action in order to provide a prospective contractor with an opportunity to demonstrate its ability to meet the standards specified for qualification.

I don't mean to interrupt the Chair. I think the Chair and I are on the same wave length.

I have no problem with prospective as distinguished from retroactive. Going back, we ought to examine what we are doing and go out again for acquisition on existing contracts and I think the language here protects you.

I would like to have a response to that.

Mr. **Gordon**. I think that language protects us. There is one element of concern. The way the legislation is presently drafted we would have the automatic elimination of QPL's or prequalification requirement every 5 years—whenever we use an item that is on a QPL list or prequalified list but don't go to a prequalified source—unless we recertify the need for the QPL or prequalification.

In other words, it says if you ever buy from anybody who isn't prequalified or on a QPL, the list is abolished.

I can visualize a scenario where we would have an emergency situation where we might for expediency not buy off the QPL because we either have an airplane down in Europe or Asia and we need a part and we have to substitute a commercial part.

I can also visualize if you mean that a QPL or prequalification comes to an end at the end of 5 years, we would then have to recertify and retest everybody, whereas I think what you really mean is that the Government should review and reaffirm the need, but the way the legislation is written now, it would require us on 100,000 QPL items and 160,000 source approval items to go back and retest and requalify everybody.

Senator **Quayle**. Do you have a figure on what the cost of this new testing and potential liability to the Government is?

Mr. **Gordon**. It could range from a few dollars to millions on a particular item.

Senator **Quayle**. In the aggregate?

Mr. **Gordon**. I have no idea. I have no way of knowing. We could go back and selectively test by sample what our experience has been, but I am not confident that that data is readily available and that we can get it to you in time or how reliable it would be because we have to ask our contractors.

[Additional information follows:]

TESTING COST

Additional information on qualification testing:

On a selective basis, typical qualification testing cost for Electrical/Electronic and Mechanical piece parts are as follows:

FSC	Product	Testing cost per item
5905	Resistors	$10,440
5945	Relays	15,516
5961	Transistors	35,964
5962	Integrated circuits	43,272
5985	Waveguides	27,828
3110	Bearings, A/F	20,008
5305	Bolts	10,168
5320	Rivets	8,528

Senator **Quayle**. The way it is set up, we would reimburse for the testing?

Mr. **Gordon**. We would like to do it in competition preceding award of major full-scale engineering development. We think we can get a commitment by that contractor for them to do it when directed, provided there is only one qualified source. We think the added cost to that will be washed out in the competition.

It is a lot easier to do it that way than it is to go back to them on a sole basis many years later and say, would you be willing to do it and for how much?

So, if we could build it into the original contracting competition, I don't think it is going to cost us very much, if anything.

General **Weiss**. If you look at the alternate fighter engine competition, that is what we did. We did use the press of the marketplace to take a look at the top 20 or 25 items that were source controlled by the prime contractor and asked each of the competing contractors to qualify other sources and include that in the price of the contract and that was done.

The real way to do this is on all new development contracts you have a dual sourcing for key select vendor items. That does not seem to satisfy what you are driving at because you want something more quickly.

On a new solicitation issue, RFP or IRD, you might want to put a line item in asking the prime to do this and then evaluate whether that price is cost effective.

The best way, of course, is on new items because competition will determine a fair and reasonable price to you.

Those are three alternatives.

Senator **Quayle**. I have one final question.

Mr. Swain, Mr. Gordon, beyond prequalification, you listed a number of other items, principally the Commerce Business Daily posting requirement and technical data people.

Do you have a comment?

Mr. **Swain**. I would like to comment on the posting requirement and be allowed within 2 days to comment on any of the others in the record.

I guess I have this vision, as Mr. Gordon suggested, of a small room at some base somewhere that has maybe 3 inches thick of things thumbtacked to the walls, all sorts of little contracts or RFP's for $3,000 or $200, or whatever.

I have talked to a lot of people in the small business community. They advise me that is not really the way things work very often; that generally, as Mr. Gordon stated, the current posting requirement requires posting over a certain amount and allows it under that amount.

There are several installations that do in fact not actually post, but make available all of their buys from zero dollars on up. What happens is that you have various reference services that for a price will advertise them, not in the Commerce Business Daily, but it is a subscription service.

I think posting is absolutely doable without making the Department enlarge all of the rooms in which the bids are posted. I think there are systems that are available that would make it very practical indeed.

Senator QUAYLE. We will look for your comments on the Commerce Business Daily.

Do you think that will be an encyclopedic thing?

Mr. SWAIN. No, sir, I don't. It is the problem of the subscriber anyway.

Senator QUAYLE. If you have good communciation between the technical people, they would not necessarily have to be DOD people working with SBA, would they?

I think Mr. Gordon's point is well taken. I am not sure we want to start splitting the jurisdiction of those people in the Department. We want to get that data and I think you might be able to get that data on a more efficient basis.

Mr. SWAIN. We think we have had good luck with the four breakouts and we would like to see that system expanded and we can do that in cooperation and not in conflict with the Department.

Senator QUAYLE. Senator Levin.

Senator LEVIN. Mr. Chairman, first to General Weiss.

Would you comment on the question of proprietary rights which are claimed as to whether or not we allow that too long in some instances on airplane parts purchases?

General WEISS. I do think we have allowed the issue of proprietary rights in the aerospace industry to go on for longer than necessary.

Yet I am also very sensitive to the need to not inhibit technology development and investment of private capital to develop new ideas.

We have looked, as Mr. Orr has asked, and we have supported Mr. Orr, we have looked at items that are sole source and we find that our items which include national stock number items, as well as others, that we find the population to be greater than 4 percent.

We feel that the lack of proprietary data tends to be a more significant problem in the Air Force than it may be in the rest of the Department of Defense. Therefore, we have taken aggressive action.

I have often been criticized by many people for the actions that I have taken in implementing Mr. Orr's policy with regard to obtaining data rights. I do want to say this.

No. 1, we have never said that we would not provide consideration to a contractor for true proprietary data rights.

We have said there ought to be a time limit when those data rights transfer to the Government as they do in patent rights.

Senator LEVIN. What is the time limit you think we should place on the claim of proprietary rights?

General WEISS. We started out, as you know, with 60 months after delivery of the first production units. Last Saturday I signed the letter, and I have a copy here, we defined our data rights policy and are saying where there is a competitive marketplace, you should try to use 60 months.

We have allowed each of the Air Force operating commands to pick an appropriate number tailored to the given situation.

Senator LEVIN. Must there be a limit?

General WEISS. I think there has to be a limit at a point in time.

Again, we are targeting those programs where there is a high propensity for sole source components and spare parts.

Where there are pressures, competitive market pressures, we don't feel that maybe data rights are necessary to be acquired, but where we find we are in a sole source environment, we feel we ought to obtain the data rights and we ought to compete those products with the proprietary data rights.

Senator LEVIN. According to our figures, at Tinker Air Force Base, 29 percent are sole source items which resulted in claims for proprietary rights.

Does that sound right?

General WEISS. It sounds about right. I have all of the Air Force Logistics Command through March 31, 1983, we screened 234,000 line items and we found approximately 21 percent of those items were sole source because of proprietary data rights.

Senator LEVIN. This is a very significant issue we are on. It is an area of great controversy, but the Air Force is telling us through General Weiss, at least today, that you believe there should be some limit set, not a fixed limit of 5 years on every item, but some limit on every item and you set the 5 years as a base, is that it?

General WEISS. Yes, sir, we need the 5 years to get the feedback as to whether that was a right or wrong number.

At this point, I can leave you a copy of the letter. We allowed that number to be set by the program office in consultation with the major air commands, Air Force Systems Command and Logistics Command.

[The letter follows:]

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS U.S. AIR FORCE,
Washington, DC, May 5, 1984.

To: ALMAJCOM-SOA (contracting).
Subject: Policy letter 84-12, rights in technical data and computer software.

1. Our 30 Sep 83 letter, "Rights In Technical Data," announced a change in policy concerning rights in technical data and computer software. This policy uses the competitive market and negotiation process to obtain rights in data to permit follow-on acquisition of items and modifications at fair and reasonable prices. Over the past few months, we have received extensive feedback expressing concerns and

suggesting improvements to the policy and its contract provision. This letter clarifies the policy and implements certain refinements to the contract provision.

2. This policy resulted from the Department of Defense's investigation last summer into the high cost of spare parts. Contractors retaining perpetually exclusive proprietary rights, often in the simplest and most common parts, was identified as being detrimental to achievement of fair and reasonable spare parts prices and a sound defense industrial base. To correct this, on 29 Aug 83, Secretary Weinberger granted a deviation to DAR and tasked the Departments to negotiate in new contracts firm dates after which the Government would receive unrestricted use of data. The Air Force implemented Secretary Weinberger's direction as an additional provision to the contract clause at DAR 7-104.9(a), "Rights In Technical Data and Computer Software" (reference AF/RDC letter, Rights In Technical Data, 30 Sep 83).

3. The purpose of this provision is to facilitate breakout and development of competitive sources for manufacture and modification of production items or any component, module, assembly or part thereof. Because of the diversity of needs and circumstances in acquiring and supporting Air Force systems, several refinements to this provision are considered appropriate.

a. First, the provision has been revised. It has been redesignated as paragraph (b)(5) of DOD FAR Sup 52.227-7013 and (b)(5) of DAR 7-104.9(a) since DAR 7-104.9(a) already has a paragraph (h) (See DAR 7-104.9(b)). The provision now permits ordering of data up to three years after delivery of all items (other than technical data and computer software) or after contract termination. The provision has also been revised to permit ordering of data pertaining to any item configuration previously delivered, as well as the configuration currently in production.

b. Second, the implementing instructions have been clarified. The provision shall not normally be included in solicitations and contracts prior to a program entering into Full Scale Engineering Development (FSED). Programs in FSED and Production shall include the provision in their solicitations and contracts. The provision may be implemented as a separate contract line item.

c. Third, while this provision should be used as written where competitive market pressures exist, HQ USAF, AFSC/CC and AFLC/CC may authorize modification and waiver of the provision when steps have been taken to eliminate contractor abuses of data rights and to eliminate excessive spare parts prices. Secretary Orr's 5 Mar 84 memorandum (Atach 1) provides examples of such steps. Additionally, standard commercial items and computer software which were developed at private expense and meet the criteria of Federal Acquisition Regulation (FAR) 15.804-3(c) may be exempted from the provision by obtaining a waiver from HQ USAF, AFSC/CC or AFLC/CC. AFSC and AFLC shall provide AF/RDC with copies of approved modifications and waivers, the rationale and any additional implementation guidance disseminated to their activities.

4. Proper implementation of this new policy requires Air Force acquisition activities to focus their attention on data rights issues throughout all phases of an acquisition program. Consequently, Air Force acquisition activities shall:

a. Develop business strategies that provide the Government with maximum opportunity and least cost for breaking out and competitively acquiring the manufacture and modification of Air Force items, including components, modules, assemblies and parts thereof.

b. Use Predetermination of Rights in Technical Data procedures to the maximum extent practicable (See DOD FAR Sup 27.403-2(d)).

c. Challenge all questionable contractor proprietary claims in technical data and computer software.

5. Please contact HQ USAF/RDCS, Major Hergenroeder, AV 225-1997, should you have any questions. This letter shall remain in effect for 120 days beyond the date of the letter unless sooner superseded, rescinded, cancelled or incorporated in a formal publication.

BERNARD L. WEISS,
Brigadier General, USAF, Director, Contracting and Manufacturing Policy.
(For the Chief of Staff.)

Attachments: 1. Secretary Orr's Memo, 5 Mar 84; 2. Revised Provision and Implementation Guidance.

DEPARTMENT OF THE AIR FORCE,
Washington, DC, March 5, 1984.

Memorandum for the Chief of Staff, USAF.
Subject: Data rights.

Several months ago, I asked you to include a clause in our contracts which would give the Air Force the right to use any "proprietary" data within 60 months after the delivery of the first production unit to which it pertained. I am delighted with the enthusiasm with which our contracting people have moved to implement that clause.

As you know, it has causd considerable comment. I am determined, however, to eliminate the abuses to our data rights policies in which contractors stamp the simplest and most common parts "proprietary" and then proceed to charge excessive prices for those parts. We must place the burden of proving that a part is proprietary on the contractor who makes the claim. After all, we as the customer should not have to prove that a part is not proprietary.

I recognize that we must foster and protect the inventiveness and creativity of American industry which has made this country great and I am not intending to confiscate the fruits of private initiative and invention. But neither we nor the American taxpayer can tolerate these abusive practices which unnecessarily inflate the cost of our defense.

Recognizing the broad interest in this subject, I have accepted the invitation of the Under Secretary of Defense (Research and Engineering) for the Air Force to lead a task group to examine these abusive practices and how best our data rights policies can be refined to prevent them. We must continue to press ahead, however, to eliminate these abuses even as this study proceeds.

I recognize that we must get on with acquiring the goods and services we need just as expeditiously as possible. Accordingly, while we review our data rights policies, I authorize the Commanders of Systems Command and Logistics Command to modify or omit the 60 month clause in specific contracts when they are convinced that other steps have been taken to avoid the abuse of our data rights policy and eliminate excessive spare parts prices. This may be done by using some of the methods we employed in the Fighter Engine competition such as requiring the contractor to provide multiple sourcing for components and parts, the use of technical assistance agreements, use of breakout, and predetermination of proprietary rights. We must also vigorously challenge contractors who wrongfully stamp data as proprietary.

In this, we must persist. We must not be deterred from our goal of eliminating these abusive practices and excessive prices.

VERNE ORR,
Secretary of the Air Force.

ATTACHMENT 2.—REVISED PROVISION

The following shall be incorporated as paragraph (b)(5) of DOD FAR Supplement 52.227-7013 or as paragraph (b)(5) of DAR 7-104.9(a), "Rights In Technical Data and Computer Software."

Notwithstanding any other provision of this contract, it is the intent of both the Government and the Contractor that ———[1] months after the first delivery of production items under this contract, the Government shall have unlimited rights as defined in section (a) of this clause, in all technical data and computer software used by the contractor, including subcontractors and suppliers at any tier, in all phases of the development and manufacturer of production items including, but not limited to, all components, modules, assemblies or parts thereof. For purposes of this subsection, the Government shall have the right at any time during the performance of this contract or within three (3) years after either acceptance of all items (other than data or computer software) to be delivered under this contract or termination of this contract, to direct the Contractor to deliver all techncial data and computer software, in a format prescribed by the Contracting Officer, necessary to reprocure from another contractor(s) either an entire production item or any component, module, assembly or part thereof, in a configuration specified by the Contracting Officer. When the Contracting Officer directs delivery of technical data and computer software under this subsection, to the extent not otherwise previously compensated for delivery of such technical data or computer software, the Contractor shall be compensated for converting the data or computer software into the prescribed form, for reproduction and delivery.

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[1] See note 4.a. of Implementation Guidance.

IMPLEMENTATION GUIDANCE

1. The revised provision supersedes and shall be used in lieu of its predecessor, para (h) of DAR 7-104.9(a), issued in AF/RDC letter, "Rights In Technical Data," 30 Sep 83.

2. Programs anticipating the acquisition of supplies and equipment which will require significant numbers of spare parts or large expenditures of funds for spare parts shall incorporate this provision in their solicitations and contracts. This threshold is defined as any program anticipating life cycle spare parts requirements of $500,000 or more. The provision shall not normaly be included in solicitations and contracts prior to a program entering into Full Scale Engineering Development (FSED). Programs in FSED and Production shall include the provision in their solicitations and contracts.

3. The provision may be implemented as a separate contract line item.

4. The provision may be tailored as follows to match acquisition objectives and circumstances:

a. The time period, after which the Government receives rights in technical data and computer software, shall not exceed 60 months.

b. The Contracting Officer may order data pertaining to item configurations that have been previously delivered, as well as currently being produced.

c. Modification or waiver of the provision may be approved by HQ USAF, AFSC/CC or AFLC/CC, provided steps have been taken to avoid contractor abuse of data rights and to eliminate excessive spare parts prices.

(1) Examples of such steps are: requiring the contractor to provide multiple sourcing for components and parts, use of technical assistance agreements, use of breakout, and predetermination of proprietary rights.

(2) Additionally, standard commercial items and computer software which were developed at private expense and meet the criteria set forth in FAR 15.804-3(c) may be exempted from this provision by obtaining a waiver from HQ USAF, AFSC/CC or AFLC/CC. Essentially these items and software are sold in substantial quantities to the general public based upon established catalog or market prices.

Senator LEVIN. That would be useful because we would apply something similar to that in the whole DOD in our bill. That is what we are after.

I understand that proprietary claims are still made on parts for the B-52; is that correct?

General WEISS. No.

Senator LEVIN. I am glad to hear it. I won't use that example.

General WEISS. As a matter of fact, we researched that and very recently Boeing has completely reiterated their position that there are no rights that they are holding back, that are rights to them.

Senator LEVIN. Is there any limit that you set on the individual command on how long a period they can set for proprietary rights?

General WEISS. We ask them to pick an appropriate time that is reasonable.

Senator LEVIN. But they must pick some time?

General WEISS. They have to pick a time.

Senator LEVIN. Mr. Gordon, do you have any objection to that approach that the Air Force is using to be adopted in my bill on the entire DOD?

Mr. GORDON. I have only one concern and General Weiss assures me that concern is not well founded.

I said I do not wish this matter to become a question of responsiveness, but only a factor to be considered in proposal evaluation and source selection.

In other words, I think it is up to the program manager to assign a relative weight or importance to the use of data and it should not become an element that is so paramount that we arbitrarily remove from the competitive range our most qualified bidders, our most cost-effective bidders, simply because they will not agree to a time limit on which to give up unlimited rights on all data.

Senator LEVIN. Our bill does provide for the consideration of the fact.

Mr. GORDON. That is right. But Bernie has assured me that that is the way they intend to use it and that they would not summarily reject a proposal because he said, no, I won't live with 60 months, you will have to wait 8 years.

I have to point out the analogy between patent rights and data rights are very strained.

Patent rights is where you publicly disclosed proprietary information in return for assurance that you have a sole source right to 17 years.

Proprietary rights are like the formula for Coca-Cola where you don't patent it, but you keep it secret. As long as you keep it a secret, it is yours.

When you talk about a time limitation and you make an analogy between patent rights and data rights, I think it is an inappropriate one at least for attorneys to make. I happen to be an attorney by education.

I can visualize some companies, like IBM on bubble memory, saying; "We will never at any price at any time give up our proprietary data pertaining to bubble memory because it permeates throughout our entire commercial line of advance computers."

Senator LEVIN. That is why we should have different approaches and craft it to a requirement where we have competition and where we don't.

Mr. GORDON. As long as you leave us the flexibility, we will comply with Congress' intent.

Senator LEVIN. There is going to be flexibility in the bill if I have anything to say about how the bill ultimately reads. I hope I have some say on that.

I think we have made some progress this morning on this issue and it is a critical issue for industry. They have some problems with the language the way it is written and I share some of their concern and we have to do it, as the general basically indicated, which is to give some real weight to people's creativity and willingness to invest. That is fair enough.

On the other hand, we have to give weight to the Government's need for competition. That is fair enough.

The balance that the Air Force has struck, it seems to me, is approaching where the DOD ought to go and that is for flexibility, but set some limits so that we are not in a situation where 20 or 30 percent of the parts we buy are sole source because of the claim of proprietary rights and we have not tried by contract to end that claim.

That is all we are talking about.

We are also talking about whether we consider that claims will be made relative to proprietary rights at the time we award the contract. This is very key.

I think what Mr. Gordon is saying is also important. You can have three contractors bidding.

One says: "I am not going to make any claim of proprietary rights at all."

Another one says: "I am going to claim 5 years of proprietary rights if you award it to me."

The third contractor says: "I am going to claim 10 years of proprietary rights if you give that contract to me."

If you ask me which contract I would go with, I would say I could not tell you. I may want to go with the 10-year contract because the price may be better, the quality may be better. There are all kinds of reasons for allowing that flexibility, but what our bill provides and it is bipartisan, is that you have to take that into consideration, you have to ask for it.

I want to know when I am awarding a contract to A, B, or C that that guy is going to claim 10 years, that guy is going to claim 5 and you are not going to claim anything at all. That is all I want to know.

I want to know it so that I can consider it. If you know it, it seems to me you can reach a more intelligent decision as to whether you ought to go with A, B, or C.

The flexibility must be there to be with A, B, or C, but I think it is valuable information to the Government or any buyer that we have that knowledge.

I have a number of other questions which I think, if I am going to pick my time limit, I will have to save for the record and I presume we will leave the record open.

I am glad to get Mr. Gordon's comment that he feels on behalf of the DOD that the current Air Force approach and modification to it makes some sense for the entire DOD.

Mr. **Gordon**. The Department of Defense expressly authorized the blanket waiver for all the services so that they could presently architect as best suits their situation their courses and policies on data rights, notwithstanding what our acquisition regulations say.

We did permit them this flexibility to experiment. What we were hoping for is that before a particular solution is statutorily prescribed the feedback from their alternative approaches would be available. To this extent we think this legislation may be premature.

Senator **Levin**. Do we have that feedback now?

General **Weiss**. We do have a study group that is chaired by the Air Force with service representation. They have come forth with a draft report. As a matter of fact, I am going to get a briefing at 2 p.m. on what some of their findings and recommendations are.

So, the fact that we have not fully staffed that study on how to handle proprietary rights, the legislation that you are proposing may be premature, and we may not be able to incorporate some of those findings.

Senator **Levin**. If you are in a position, we would appreciate a copy of that draft report.

Mr. **Gordon**. The report was required by Congress.

Senator **Levin**. The draft?

Mr. **Gordon**. The draft is to prepare for the report required by Congress at the end of June.

Senator **Levin**. If you are in a position, we would appreciate a copy of the draft report.

Senator **Quayle**. You can get it, can you?

Mr. **Gordon**. I don't know.

Senator **Levin**. Forget it. We already have it.

General **Weiss**. The title of the draft report is inappropriate.

Senator **Levin**. We can brief you at noon, General, and beat you by 2 hours.

General **Weiss**. The title of the report is inappropriate. It is an either/or situation and it is not the intent of the Air Force or the Department of Defense that it be an either/or situation.

Senator **Levin**. I don't know if you are impressed with our staff work, but I am. We will note that.

I think we should make it clear it is not an either/or situation and the title is not the one that they would want in their final report.

General **Weiss**. The title says, "Who Should Own Data Rights, Government or Industry." That will be changed this afternoon.

Senator **Levin**. We will not, by the way, take this as being anything final.

General **Weiss**. It should not be at this point.

Admiral **Sansone**. Mr. Chairman, if I may, I would like to at least offer the Navy position with respect to what we have done in the test program concerning an option for rights in data, for limited rights in data where the contractors have given us indication that they are going to limit some of the rights, an option provision which does not have a time limitation on it, but I think if the Chair would ask, I would be pleased to give you the results of our test or at least proposed test of the version we are thinking of.

The results I don't believe are available at this point.

Senator **Quayle**. We would appreciate that information.

Senator **Levin**. If we could get similar information from the Army, that would be most helpful, too, if there is such a review going on.

General **Stallings**. Senator Levin, you have been out to Detroit and I know you have talked to the folks out there and you have their response in that particular area.

I think that I would say pretty much the same thing as Mr. Gordon. The Army has not experienced the problem with data rights that some of the other services have.

It does seem to us that it would be unfortunate to pay for data rights that we really are not going to use. The sweeping scope of what we have here would grant royalty free license in 5 years or 7 years even if use is not intended.

We think we should have more flexibility on the cutoff period. We think flexibility should be at the major project manager level. He should be able to decide when he needs that data and then to go after it contractually with that contractor and to have it considered in the source selection process.

We just don't have the problem of lack of data for reprocurement. We told our project officers very similar to what General Weiss said. We left it up to them and we think that we have the ability to choose which items proprietary data is usable.

We should give them some sort of payment for those data when we decide it is to the best interests of the U.S. Army for reprocurement, for breakout, or whatever it may be.

But across the board we are going to end up paying for that data. If we just say at the end of the 5 years we are going to get a royalty free license for that data, the cost will be translated into that contract.

Again, we are going to pay for these data and we just don't think it is wise to pay for data that we are not going to use.

Senator LEVIN. In those cases where you don't need it.

Senator QUAYLE. As the Chair said at the outset, we will reconvene at 2 p.m. this afternoon to hear the other two panels.

If there is no objection, the committee is recessed.

[Whereupon, 11:50 a.m., the task force recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

The task force met, pursuant to recess, at 2:08 p.m., in room SR-222, Russell Senate Office Building, Senator Dan Quayle (chairman of the task force) presiding.

Present: Senators Quayle, Jepsen, Levin, and Dixon.

Staff present: Alan R. Yuspeh, general counsel; Jeffrey H. Smith, minority counsel; and Marie Chaillet, staff assistant.

Also present: Jon Etherton, assistant to Senator Jepsen; Bernard R. Toon, assistant to Senator Quayle; John O. King, Senator Quayle's staff; and Charles C. Smith, assistant to Senator Dixon.

Also present: Ralph White, Governmental Affairs Committee; and Bill Montalto, Small Business Committee.

Senator QUAYLE. The committee will come to order.

The witnesses this afternoon will be Wilsie Adams, representing the National Security Industrial Association, and John Chapel, representing the Sundstrand Corp.

Both of your statements will be fully incorporated in the record. If you would like, you may summarize.

Please proceed.

STATEMENT OF WILSIE ADAMS, REPRESENTING THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION

Mr. ADAMS. Thank you very much, Mr. Chairman.

NSIA appreciates the opportunity to participate in the hearing and to offer our views on these pending bills.

I would like to make it clear at the outset we do support many of the provisions of these bills and our member companies are also very supportive of the concept of competition.

I have also been asked to tell you that the NSIA statement has been reviewed by the Scientific Apparatus Makers Association and they thoroughly endorse and agree completely with the statements being made by NSIA this afternoon.

I would like to concentrate my remarks on the subject of data rights. That is the subject which provides the most difficulty for the member companies.

It is basically our position there should not be any legislation with respect to data rights at this time.

You heard Mr. Gordon this morning when he testified earlier to the effect that it is estimated that there are only 3 to 4 percent of all of the spare parts in the Defense Department that are in any way affected by rights to data.

The real problem is not the problem of rights to data, but the Government's ability to manage the data which it has. We believe those statistics, the 3 to 4 percent figures, indicate that there is not enough private investment being made in products that are likely to be used by the Defense Department.

Where a contractor is entitled to mark his data with limited rights legends, limiting the Government's ability to disclose that information outside the Government, where that occurs in only 3 to 4 percent of the parts we are talking about, there is not enough contractor investment going on.

This committee should be concerned with policies that would encourage additional investment by contractors rather than considering provisions which would discourage investment by contractors.

We would urge you not to legislate with respect to the subject of data rights at all at this time. It is not necessary for that reason among others.

In addition, you heard this morning about the ongoing studies being made at the Department of Defense with respect to exactly this subject.

I think it is very interesting to note that General Weiss sits here and testifies concerning his programs to impose time limits on contractors' rights to prevent the Government disclosure of their data but refers to the draft report which has just been issued which states that there should not be any time limit with respect to the use of data rights.

While the study group is going in one direction, the Air Force is going in another direction entirely. What this highlights to me is not the question of who is right, but the question that legislation on the subject is premature. We should await the outcome of the studies.

It is also our understanding that there are other studies underway or about to be undertaken with respect to the subject of the impact of disclosure of proprietary information to the public on other defense issues in the international arena.

Everyone is concerned about the dissemination of manufacturing and technical information to our adversaries. Yet if the Government receives unlimited rights to what has been earlier contractor proprietary information, that unlimited rights information will become available under the Freedom of Information Act and in other manners and become available outside the country as well.

We do not believe that this subject has received adequate consideration at all.

We understand that the Commerce Department is about to undertake a study of these aspects data rights problem.

So, with that introduction, we do not believe that legislation is necessary with respect to data rights. It has not been a contributing factor to the spare parts problem.

When you are talking about hammers and allen wrenches, and so forth, you are not talking about proprietary rights. You are talking about the inability of the Government to manage the data it already has.

We do believe the legislation with respect to the management plan and implementation of those plans is appropriate.

We would urge you not to legislate with respect to data rights at all at this time.

We certainly believe that if you legislate with respect to data rights, there should not be any manadatory provisions requiring sale of proprietary information to the Government nor should there be any time limits imposed on contractors or legislation on the duration of the contractors' right to exclude the Government from disclosing this information to the public.

We believe that such provisions tend to discourage participation in the defense marketplace.

As I indicated in our statement, it is a fact that where the Air Force has attempted to do this by the use of their (h) clause, they have had contractors who have refused to bid on their programs.

There have been many other contractors who, while submitting proposals to contract with the Government, have conditioned those proposals on an exception to that provision. It is definitely an anticompetitive provision which discourages participation in the defense marketplace.

Furthermore, where a contractor knows that in order to participate in the contract, he will eventually, whether by time limit, sale or otherwise, give up his rights to valuable commercial trade secrets, that contractor is going to be encouraged to provide to the Government only those products which do not incorporate his most valuable information or he will be discouraged from providing additional investment dollars needed to upgrade and improve the defense products.

Certainly commercial items must be exempted from the application of any of the bills that we are talking about.

I heard the introductory remarks this morning. I understand there is to be an amendment offered to except commercial products from the application of any of the statutes that we are talking about.

I heard the introductory remarks this morning. I understand there is to be an amendment offered to except commercial products from the application of any of the statutes that we are talking about.

We are pleased to hear of that development because we honestly believe that subjecting the contractor's commercial products to disclosure to the public, his manufacturing processes, or trade secrets related to commercial products, subjecting those to the requirements of this act, will in fact reduce the mobilization base.

We have noticed, as everyone has, that in many cases, several of the pending bills deal with the same subjects in different ways.

As a rule of thumb, we have found that the language utilized in S. 2572 when it addresses the same subject as in one of the other bills, in our opinion, addresses the subject in a more reasonable manner.

We would urge that in your markup you should consider strongly the language of S. 2572 where the same subject is being dealt with in more than one bill.

I will conclude my summary and hopefully save time for questions.

[The prepared statement of Wilsie Adams follows:]

PREPARED STATEMENT OF WILSIE H. ADAMS, JR., NATIONAL SECURITY INDUSTRIAL ASSOCIATION

Mr. Chairman, and members of the Armed Services Committee, I am Wilsie H. Adams, Jr., a member of the Procurement Committee of the National Security Industrial Association [NSIA] and a partner in the law firm of McKenna, Conner & Cuneo.

On behalf of the NSIA it is my privilege to present the views of the association on S. 2489, S. 2571 and S. 2572.

The National Security Industrial Association is a national organization of more than 350 U.S. manufacturing, research and service companies of all sizes, from all parts of the country, and from all segments of industry interested in and related to our national security. A copy of our annual report, which lists our member companies has been previously furnished to the committee.

Established 40 years ago, NSIA serves essentially as a two-way communication medium between government—primarily the Department of Defense—and the industry which supports it. It is our purpose to develop and foster mutual understanding between industrial concerns and any one or more of such government establishments to the end that the problems of each may be considered and resolved through cooperation between such establishments and industry and to assist any one or more of such government establishments with technical information relating to industrial experience and practices.

We in the NSIA appreciate the interest which has developed in the subject of competition. We agree that improvements in this function can be made by both industry and the Government, and indeed, measures have been taken and others are underway which will improve competition.

We appreciate that much of the interest in increasing competition has been generated by the recent publicity concerning spare parts acquisition. The comprehensive Air Force Management Analysis Group (AFMAG) report of October 1983 entitled "Spare Parts Acquisition" stated on page 1-7: "Industry has become as concerned as the Air Force over the cost of spare parts and has made spare parts acquisition practices a major agenda item at top management levels."

In view of the extensive attention which has been given to the subject of spare parts, we feel it is important at the outset to place spare parts, and in particular those types of spare parts which have caused most of the controversy, in perspective. The AFMAG report previously referred to identifies correctly that the major problem area concerns those spare parts acquisitions in which small quantities of low value items are purchased noncompetitively (p. 2-37).

We agree with the report that in the vast majority of spare parts acquisitions where reasonable quantities are purchased, where the protections of Public Law 87-653 apply, or where competition has been obtained, reasonable prices have resulted.

We should keep in mind that the experience observed in the acquisition of small quantity, noncompetitive, low value spare parts is not typical of most Defense Department procurement. We are concerned as we know you are, that the solutions to the problems identified should not impose a disproportionate burden on the acquisition process. We must avoid the temptation to overmanage the problem area at the expense of other more important considerations even though the problems are substantial.

We wish to cooperate with the committee in protecting the taxpayer by fashioning constructive and effective solutions to the problems which have been identified.

We support some of the major areas covered by the bills but must respectfully disagree with others.

Most of my remarks will relate to the subject of rights to technical data. Before commenting on these sections it is important to put the subject of data is context. In any discussion of technical data and the rights to technical data, there must be an appreciation of the role that nondisclosure plays in the very existence of trade secret information. the entire value of a trade secret is embedded in non-disclosure both as a practical and as a legal proposition. Once technical data is disclosed without limitation it loses its identity and value as a trade secret. Before disclosure it is a protectable property interest, an asset. After disclosure it loses all characteristics as property; that is, its identity as a trade secret, which can never be reclaimed. Unlike a patent where a limited monoploy is granted in exchanged for disclosure, data to retain its value as a trade secret cannot be disclosed and must be carefully guarded. Companies are extremely cautious of data because they must be. Once it's gone, it's gone forever.

Nevertheless, Mr. Harvey J. Gordon, the Assistant Deputy Under/Secretary of Defense, Research and Engineering (Acquisition Management) on page 4 of his prepared statement before the Investigations Subcommittee of the House Armed Services Committee on March 13, 1984, indicated that less than 3% of the 2.2 million items reviewed for breakout are restricted due to contractor claims of proprietary data. In the AFMAG report referred to earlier it is indicated that limitations on the government's right to use technical data have had a limiting effect on competition in only 8% of the spare part reprocurements. (p. 2-16). Other studies have indicated 4%.

These are revealing statistics in many respects. They highlight what a small role data rights actually play in the overall spare parts problem.

If one desires to see private investment in the development of innovative and superior products, one would like to see a much higher percentage than even the 8% previously mentioned. Likewise, if the perception were true that companies routinely improperly mark data with limited use legends, one would expect the 3% or 8% figures to be significantly higher. We would conclude that the acquisition process is not sufficiently encouraging private development of defense hardware and manufacturing processes and that companies do not routinely apply inappropriate limited rights legends to technical data.

Compare these statistics to those at p. 2-18 of the AFMAG report which indicate that there is a 10% error rate in the processing of data already held by the Air Force central data repository and that 60% of the time, the repository is unable to provide data requested by users and then only after weeks have passed. We would submit that data management rather than rights in data is the larger problem.

We believe that the provisions of both S. 2489 and S. 2572 which require the agencies to develop and implement a plan for the management of data are an important and worthwhile contribution to the solution of the spare parts acquisition problem. We believe the plan should concentrate on data to be acquired in the future. While we have some concern about the cost of such a program and the time limit imposed, again, it is apparent that the management of data has been and still is a major problem in Procurement of replenishment spare parts. The committee is correct in drawing attention to this problem area. We prefer the language of S. 2572.

On the other hand, it has been clearly demonstrated that limitations on the right of the Government to utilize contractor trade secrets in the acquisition of spare parts have not been a significant factor in the problems associated with the acquisition of spare parts. Consequently, we do not believe that there is any need for legislation regarding the respective rights of the parties to technical data at this time.

Furthermore, this subject, that is, who should have the right to disclose technical data, is currently the subject of study by the Department of Defense and this study group has very recently issued the first draft of its Report. This Report confirms that the acquisition of rights to data has not been a significant problem in spare parts acquisition. While it makes some recommendations for changes to the standard provisions used and to the regulations governing when these provisions will be used, the Report does not reflect the need for any legislation at this time.

It must be remembered when discussing the subject of trade secrets that there really is no accepted definition of a trade secret. It can be any form of business information which a contractor or a businessman chooses not to disclose to his competitors. One thing is clear, however, if the nature of the secret can be ascertained from a mere observation of the product or if it can be obtained through the process known as "reverse engineering", there really is no trade secret involved in the first place. Thus, trade secrets and the right of the Government to disclose proprietary information of a contractor really have no bearing and play no role when you are discussing such simple noncomplex products as Allen wrenches and claw hammers.

With that introduction, I would like to move to the question of the manner in which the rights to technical data are being addressed in the bills presently pending before this committee. Both S. 2572 and S. 2571 contain provisions which would require the use of regulations and contract provisions which would provide for an automatic time limit on any limitations on the Government's right to disclose technical data outside the Government. We believe these provisions are inappropriate. There should not be any statutory time limit on the duration of a contractor's right to preclude the Government from disclosing trade secret information developed by the contractor at his own expense for many reasons.

The subject of trade secrets historically is not the subject of federal law. Trade secret law is the subject of the common law and the law of each of the fifty states of the United States. Subjecting a contractor to mandatory time limits on the duration of his trade secrets as a cost of doing business with the United States, in derogation of the law of all fifty states as well as Public Law 97-219, will preclude many companies from doing business with the U.S. Government. Some companies including small businesses, simply will refuse to do business with the Government, if to do so requires them to give up their rights to valuable commercial trade secret information. It is a fact that some companies have already refused to submit proposals to the Air Force when the Air Force solicitation included provisions applying an automatic time limit to the rights of the contractor to its proprietary information. Other companies have bid on such proposals and but have taken exception to the so called "h" clause provision.

We believe that the fact that a mere three percent of Government acquisitions are affected by the contractor's rights to proprietary information indicates that there is already insufficient motivation for contractor investment in the development of products needed by our Government. Contractors faced with the loss of privately developed trade secret information may choose to further reduce their investments in research and development for items likely to be used by the Government.

Contractors who choose to continue to do business with the Government in the face of a mandatory time limit on their proprietary information may choose to provide to the Government only those products which do not incorporate their most valuable trade secrets resulting in the receipt by the Government of technically inferior products.

In addition, once trade secret information is available to the Government for disclosure to the public it will become even more difficult to prevent the disclosure of such information to foreign sources with a resultant adverse impact on our own economy and on the national security interests of the United States.

The implementation of a time limit on proprietary data will also result in an increased cost to the Government. Predictably the Government will be required to pay to the contractor the fair market value of his trade secret, whatever that may be. The value of such information is extremely difficult to price. Nonetheless, if the Government is to acquire the rights to disclose such information, it will be required to pay for those rights and I foresee a great deal of time and money being spent in the negotiations of the appropriate value of such information which will lead to protracted negotiations, increased costs and additional paperwork.

Furthermore, there are many contractors who are parties to existing licensing agreements, either as a licensor or a licensee, which agreements may preclude their furnishing the Government unlimited rights to the data which the Government seeks. For example, a contractor, being a licensee of the data of someone else, may have a limitation in his license agreement on his ability to disclose that information to anyone without appropriate safeguards against its further disclosure. Also, where a contractor is a licensor of data, that license agreement normally will provide that the contractor's right to receive royalties for the use of his data will be governed by a "most favored customer" provision. Once this contractor discloses or permits the Government to disclose this information to the public, his right to royalties under such a license agreement will expire.

All of this goes to the question as to whether or not there should be any time limit imposed on the Government on a contractor's right to his trade secret information. We do not believe there should be a time limit. If one were to assume that a time limit of some kind should be imposed, then it becomes appropriate to discuss what the duration of that time limit should be. This also is an extremely difficult, if not impossible period to ascertain. Very often, where a contractor has developed a new product it may take considerable time to develop the market for that product, either within the Government or outside the Government in the commercial marketplace. To provide that the rights to the technology related to that product will expire within a period following the performance of his first Government contract may mean that his rights to that technology will expire prior to the development of his commercial market. On the other hand, some products are of such a technical nature and some technologies are moving so rapidly that the useful life of a trade secret in a particular case may be extremely short as technology overcomes his advantages in a short period. Yet, some products and some technologies are likely to have a prolonged useful life and the trade secret developed by a contractor may provide him with a competitive commercial edge for a considerable period. If there is to be a time limit it should be negotiated on a case by case basis. We recommend the deletion of subparagraph (c) of the proposed § 2386(a) as added by § 8 of S. 2572 and § 3 of S. 2571.

The draft report of the DOD study group in discussing the subject of time limits to be applied to trade secret information has reached the conclusion that there really should be no standard time limit applied to the duration of the Government's right to disclose "limited rights" information.

To quote the report and it is a draft report at this point, on page 14, "The bottom line is that there is no clearly established advantage to such a policy and the potential disadvantages are real enough to weigh heavily against the proposal."

We agree with this conclusion.

Similar in its result and consequences would be any policy which has the effect of requiring a contractor at any time to sell to the Government the right to disclose his trade secret information. Such a policy would be equally negative in its impact on the mobilization base and would again frustrate the need for privately financed research and development in the Government marketplace.

We do not believe that the contractor's willingness to sell to the Government the right to disclose his proprietary information is an appropriate subject for consideration in determining to whom a contract shall be awarded. Thus, we conclude that subparagraph (k)(3) of section 7 of S. 2572 should be deleted and likewise recommend the deletion of the provisions of subparagraph (b) of § 3(e)(1) of S. 2571 and section 3 of S. 2489. Such provisions tend to reward contractors who do not invest in their products or who offer inferior products.

If the Congress should conclude that these provisions should not be deleted, at the very least, there should be a clear exception provided with respect to technical data relating to commercial products developed at private expense. By commercial products I mean those products which are offered for sale to other than the Federal Government and which have a usefulness in the commercial marketplace. S. 2489 presently contains a blanket exception for data relating to commerical items from its application. This is found in the definitions of technical data where information relating to commercial products is exempted from the definition and thereby excluded from the application of the statute. We believe this is most appropriate. This same approach could also be used for S. 2571 or S. 2572.

I will now discuss the provisions of each bill in turn.

S. 2489

The following comments relate to S. 2489 as reported by the Small Business Committee on 8 May, 1984.

Section 1—no comment.

Section 2—no comment.

Section 3

As a general observation, we do not believe that it is appropriate to enact procurement laws of general application as provisions of the Small Business Act. Rather procurement laws of general application should be included in either the Armed Services Procurement Act, the Federal Property and Administrative Services Act or both as appropriate. Having said that, I will move to the substantive provisions of section 3. We believe that section 3 should be deleted because its provisions tend to penalize the contractor who has invested in the product development while favoring the contractor who has not done so or who offers an inferior product. In addition, the provision identified as subsection (m)(1)B) is awkward. What seems to be intended is that weight should be given to proposals to incorporate components which components may be secured competitively when the components are likely to be required in substantial quantities during the system service life. Essentially what I am saying is that the second part of the section should be the first part and the first part should be the second. Sections (m)(2)(A) and (m)(2)(B) are likewise awkward in their construction.

Section 4

We generally support section 4. However, we do not believe there is any justification for the quantity of five as appears in subparagraph (n)(3). If there are two or more qualfied competitors, i.e. competition is already present, there is no real justification for the Government bearing the cost of qualifying an additional three solely for the sake of increasing competition.

Section 5

In subparagraph (3) of section 5(a) which adds a new subparagraph (B), we believe the requirement in subparagraph B(i), that the unit prices be published, may be going to a level of detail that is not absolutely necessary and may disclose information to the competitive disadvantage of the earlier supplier. Generally speaking, contract information is readily available under the Freedom of Information Act to include the contract price. However, there have been cases in which the breakdown of the total contract price into separate line items and individual unit prices has been withheld from the public because such information can reveal financial information unique to the original supplies the disclosure of which is harmful to that supplier. We recommend that subparagraph (i) be deleted inasmuch as subparagraph (ii) provided adequate information when the aggregate dollar value and total number of units over a two year period is disclosed.

Section 6

The requirements of subparagraph (a)(3) added by § 6(a) which require the establishment of separate payment line for the technical data developed to be delivered under the contract may be problematical. It has long been the practice of the government to withhold payments for failure to make timely deliveries of acceptable data. However, it is not always the practice to provide separate prices for all the data to be delivered under the contract. Very often the price of the data is included within the price of the product and this facilitiate the negotiation of bottom line pricing and avoids the necessity for disclosure of financial information which could be harmful to the contractor. I also foresee problems with the application of Public Law 87-653. If the price of each data item must be supported by cost and pricing data and in fact data is being purchased which has been developed at private expense and the subject of the price is the payment to the contractor of the Fair Market Value for the release of his rights to that data, cost and pricing data is not appropriate.

With respect to the language of section 6(a) subparagraph (o)4) which requires the inclusion of a definition of the phrase "developed at private expense" in each contract, I would note that that phrase is defined in S. 2572 at section 6. This phrase "developed at private expense" has been in use in contracts for almost 20 years. The definition contained in S. 2572 is an adequate definition and essentially provides that anything is developed at private expense unless the Government has directly paid for that development as a specific element of performance under a specific contract or subcontract. In other words, development at private expense is the opposite of Government expense. It should be made clear in the report that there is no intent to change the historical meaning of the phrase.

With respect to subparagraph (o)(6), I believe that the provision that the contractor be prepared to demonstrate the justification for his assertion within 60 days for "as long as such restriction is asserted by the contractor or subcontractor" is too long. We prefer the approach taken in S. 2572 which limits the contractor's obligation to provide such evidence to three years following the completion of the contract under which the data was delivered. This period coincides with the period normally required for the retention of records relating to the performance of a contract. To impose a period greater than that period required for the retention of other contracts records is unreasonable. One should recognize that the data normally considered in determining whether or not an item was developed at private expense includes employee time cards and cost records. In addition, it may include laboratroy notebooks of engineers and so forth. Normally, such records would be disposed of in the ordinary course of business and not retained for indefinite periods. It would seem appropriate that the first time a contractor delivers an article to the Government and delivers the data with respect to that article with limited rights, the contractor should be required to demonstrate during the period of records retention for that contract that the item was in fact developed at private expense. However, where there are repeated sales of the same article over the years and where that data is continually submitted with the same limited rights legend, we believe that the contractor should only be required to maintain those records for three years from the delivery of the first article. Thererafter the contractor should only be required to demonstrate that he has consistently treated that information as a trade secret without being required to demonstrate that it was in fact developed at private expense prior to the delivery under the first contract. It would appear reasonable that once the Government has had a period of three years within which to challenge the markings on a specific piece of data that thereafter the Government's rights to make such a challenge should expire and a contractor should be allowed to dispose of his historical records. It seems totally inappropriate that the Government should, after passively acknowledging the contractor's rights for more than 3 years suddenly come forward and require copies of records that would normally not be available.

I would note that the provisions of the standard rights in data provisions already require contractors to have a system for ascertaining when limited rights markings shall be applied to technical data and that such systems are available for review and audit by the Government. It seems appropriate that when the Government has reviewed and audited the contractor's method for determining when to use markings on drawings and has had three years within which to challenge the markings on a particular document that then the contractor should be allowed to dispose of his records.

Subparagraphs (o)(7) and (o)(8) relate to the subject of a prime contractor limiting the rights of subcontractors to utilize the prime contractor's data in the performance of contracts with the Government directly. This same subject is dealt with in S. 2572. We prefer the language in S. 2572 which generally prohibits any prime contractor from unreasonably limiting the ability of any subcontractor from dealing directly with the Government for the subsequent supply of components or replenishment spare parts.

With respect to section (o)(9), we believe that source information with respect to lower order components of commercial components should not be required.

Section 6(b) including subparagraph (1), (2), and (3) are the provisions which require the department to come up with a plan for the management of data and the implementation of that plan. This is a laudatory provision, however, we prefer the language of S. 2572 which has a similar requirement and intent.

Section 7

Section 7 deals with the procedures for challenging the contractor's marking limiting the Government's right to disclose proprietary data outside the Government. We have no strong objections to this provision. As stated, it appears to reflect the current provisions of the contract. There is one change that is being made with which we agree completely. That is the provision of subparagraph 6 which indicate that restrictive markings will not be removed from any data until after the completion of the litigation under the Contract Disputes Act. This provision, which allows the contractor to protect the data until the completion of the litigation is essential. The language could be made somewhat more clear that this is the intent of the provision. However, this could be accomplished by language in the Report on the bill indicating that this is the intent. In addition, the bill or the Report should reflect that nothing in section 7, including its reference to resolving disputes concerning the proprietary of marking under the Contracts Disputes Act, in any way limits or affects the current jurisdiction of the United States Federal District Court in cases such as *Megapulse* v. *Lewis,* 672 F.2d 959 (1982).

At the current time, only the U.S. Federal District Courts have any equitable jurisdiction to provide injunction relief against the inappropriate release of trade secret data. This jurisdiction should not in any way be affected by this Act. There are situations where the Government's disclosure of data or the Government's proposed disclosure of data may not be preceded by the procedures contemplated by section 7 and the need for Federal District Court jurisdiction will continue.

Subparagraph (6) of section 7 would require the contractor to pay the cost of the litigation if the contractor's assertion of limited rights is not substantially justified. We believe that this provision should be made reciprocal, i.e., where there is no substantial justification for the Government's challenge of the "limited rights" restriction than the Government should be required to pay the contractor's expenses, including legal fees. This is also our position with respect to the comparable provision of S. 2572, section 8, subparagraph (b)(2) of proposed section 2386a.

I have no comments on the remaining sections of S. 2489 except to once again express support for the exclusion from the definition of technical data (and thus from the provisions of this Act) of data relating to products or components or processes that have been developed at private expense and that relate to products offered for sale to the general public. Commercial data and data relating to commercial items should not be subject to this Act.

S. 2572

This bill is the same as H.R. 5064 as previously reported by the House Armed Services Committee. We generally support this bill. We would suggest certain changes.

First, we recommend the deletion of paragraph (c) of Section 8 which would require regulations to provide a 7 year time limit on the right of a contractor to protect from disclosure his privately developed trade secrets. For the reasons earlier stated, we disagree with the concept of automatic time limits on such rights.

We would suggest that if the provision is retained then at a minimum provisions be restored which would exempt data relating to commercial items. While the House Report (98-690), makes it clear that such data is not intended to be covered by the bill, language implementing this intent is needed. This can be accomplished in many ways. One way is to use the approach of S. 2489 and exempt such data through the definitions. A general exemption from the act of technical data, developed at private expense, which relates to products offered for sale to other than the Federal Government (general public) would not only protect such data from the time limit, which is essential, but would also insure that the marking provisions are reasonably applied to prevent the needless and wasteful source identification of subcomponents of commercial components.

We recognize that subparagraphs (a) (1) thru (9) of section 2386a added by section 8, reflect the existing criteria of the regulation. We believe it is important that the record of this bill reflect that these provisions are not intended to increase the rights of the Government beyond those associated with the historical interpretations of these provisions.

In general, while we support many of the provisions of both S. 2489 and S. 2572 where the same subject is covered by both bills, we prefer the language of S. 2572.

S. 2571

In general, we are opposed to this bill although some of the concepts included are supported in the manner covered by S. 2572 or S. 2489.

Section 2

Section 2 would add a new section 2386(a) to title 10. Subsection (a) of this provision includes definitions. We prefer the definitions of S. 2572 or S. 2489.

Subsection (b)(1) would require the purchase of unlimited rights to all data. We are opposed to the mandatory sale of trade secret information. Not only are there serious problems associated with placing a dollar on such information, some companies would simply refuse to sell, where the trade secrets are the life blood of the company. The limited exception to the mandatory purchase found in subsection (b)(2), i.e., that the purchase is "not economically advantageous" is too narrow. We foresee protracted negotiations over the price and what would be essentially a guess as to any potential savings, usually resulting in a totally subjective judgment as to what is "economically advantageous."

We do not believe that sections (c) or (d) are of any value and are not needed. The contract always states what data is required to be delivered and when, including data related to engineering changes.

Subsection (e) requires a certification and guarantee. We do not believe that a contractor is able to certify that data is sufficient for any particular purpose. For example, if the purpose is to permit manufacture by others, most data would not be sufficient due to differences in the physical facilities of different potential manufacturers. The warranty approach of S. 2572 is more appropriate, i.e., the contractor warrants that the data delivered meets the data requirements contracted for and if not the contractor will correct the data.

Subsection (f) provides for suspending progress payments when data delivery is delinquent. The current regulations call for withholding certain payments subject to a ceiling and are adequate without totally disrupting the financing of other contract work.

Section 3

Section 3 of the bill would add Section 2386(b) to title 10. Section (a) would normally impose a 5 year time limit to the contractor's right to limit Government publication of his trade secrets on new contracts while section (b) would apply a 17 year time limit to data already delivered under old or existing contracts. As previously described, we are opposed to any automatic time limit as unnecessary, counterproductive, expensive and contrary to the interest of all concerned.

Section (c) would require consideration of the degree to which the Government's right to disclose trade secrets are limited in deciding who should receive a contract. This subject is also covered by S. 2489. We oppose the concept. The Government should encourage private financing of development. This provision would favor those who refuse to invest in their product or those who offer inferior products.

Section 4

Section 4 of the bill would require regulation of pricing of spares, particularly by limiting the allocation of overhead. We do not believe this is feasible especially if uniform cost accounting standards are to be maintained. Prices should be competitive and if not, then negotiated, subject to the regulations on negotiated contracts and the allowability of costs.

Subparagraph (b) of section 4 would require additional marking with source information. We are not opposed to reasonable requirements for source identification but prefer the approach of S. 2572. Source identification at the component level should be reasonably applied particularly when you get to commercial components. Source identification of subcomponents of commercially available components should not be required. There is a point at which source identification becomes more troublesome and costly than its worth.

Section 5

Section 5 would lower the threshold for certified cost and pricing data from $500,000 to $100,000. We do not believe this change is necessary since contracting officers are presently empowered to request cost and pricing data at lower levels whenever they deliver. The evidence is clear that it is the non-competitive acquisition of low dollar value items in small quantities that is at the heart of the spare parts acquisition problem. These acquisitions would rarely reach even the $100,000 threshold. In addition, lowering the threshold to a level appropriate over 20 years ago when Public Law 87-653 was first passed is not cost effective. It will result in additional time and expense in the acquisition cycle and result in expensive, unnecessary and wasteful audits.

Section 7

Section 7 encourages the procurement of spare parts in economic quantities. While we certainly agree that this should be done whenever possible, we do not believe it is feasible to statutorily require every potential contractor to suggest two alternative quantities and separately price each quantity in every instance.

CONCLUSION

We are pleased to have had this opportunity to present our views on the pending bills. We recommend that you concentrate your attention on S. 2572 and S. 2489. There are provisions of each which we believe would make a contribution to the acquisition process. We do not believe legislation with respect to data rights is necessary. If you should choose to legislate in this area we strongly urge you to reject the concept of mandatory sale or license of information developed at private expense and the concept of automatic time limits on the rights of a contractor to protect his trade secrets. In any event, we urge you to exempt from the application of any bill, technical data related to items developed at private expense and offered for sale to the general public, manufacturing data and data that is the subject of a license agreement.

Senator QUAYLE. Mr. Chapel.

STATEMENT OF JOHN CHAPEL, REPRESENTING THE SUNDSTRAND CORP.

Mr. CHAPEL. Mr. Chairman, on behalf of Sundstrand, it is my privilege to present to you today our views on the various pieces of legislation having an impact on our corporation's proprietary data rights.

As a producer of a diversity of proprietary component systems, we believe that the passage of this proposed legislation would have a detrimental impact on our corporate viability as a long-term supplier to the United States—that this same impact will be felt by the many other companies similar to us—and by our suppliers.

I do not intend to discuss in detail the specific language contained in any of the bills under consideration, as all of our time is limited. I would, however, like to spend the time you have granted to me to discuss how we see the conceptual issues and to explain to you how we see these issues affecting us and other suppliers.

In the defense marketplace, and in particular in the aerospace segment, one finds, beginning at the first or second subcontractor tier, a group of suppliers who typically supply very similar products to both the public and private sectors. Typically this sales mix between public and private sectors will be about a 50/50 split.

I believe it is important for us today to get a clearer understanding of how these subcontractor and supplier levels do business. By this understanding, it is our hope that you will better understand the position we must take regarding the ownership of technical data.

Supporting the prime contractor in the development of any new system, we find these many subcontractors using base technology which has been developed over years, and applying some application engineering to this base technology to satisfy the current systems requirements. In this case, the contract usually only funds specific testing for performance verification.

In evaluating these programs the subcontractor will look at the investments that must be made to participate in the program and determine the investment potential looking at future sales and other applications. If the investment potential is not there, he will divert his resources elsewhere.

What we usually find is a system of continually building on proprietary technical rights. Often we find that the commercial market has paced the military market at this level, and if the subcontractor is forced to yield his proprietry rights, he may be forced to change his business approach and concentrate his newer technology toward the commercial market, and only use older technology in situations where he loses these rights.

Defining a specific time limit for the release of technical data is to us unacceptable. It is unacceptable because a time limit on proprietary rights will vary from weapon system to weapon system, supplier to supplier, and even component to component.

What is suitable for the electronics industry will not be suitable for the makers of rotating machinery. What is suitable for a missile system will not be suitable for the manufacturer of rations.

I recently spoke to some of our manufacturing operations people and asked them how long it took us to develop some of our proprietary processes, how long have we been using them, and how long will they last. I would like to give you two specific examples.

One, electron beam welding on some critical parts we supply took us 10 years to develop. We have using the process since 1969 and see it going on in the future as long as we manufacture that type of part.

Two, diffusion bonding of two materials in a critical part took 8 years to develop and has been in use since 1976, and again, we see it going on into the future.

For years we contractors have lived with and abided by the rights and data requirements set forth by first ASPR, then DAR, and now FAR. We find in these provisions, properly implemented, the capability for the Government to accomplish substantially all aspects of what is contained in the proposed legislation.

But most importantly we find in these regulations recognition of specific circumstances with resultant fairness in regards to recognition and protection of contractors' proprietary technical data rights.

We do not want to see legislation enacted which makes it impossible for us to survive as a viable supplier.

Prior to today, I have spent considerable time talking to the Small Business Committee of the Senate regarding legislation they were proposing. The core of my conversation has been to define technical data as that data which was specified and directly funded as a line item of performance in the contract.

This definition then does not call for an interpretation of the phrase "developed at private expense".

I am here to present three concerns Sundstrand has regarding this proposed legislation.

We believe some of the provisions contained in some of the legislation are an "overkill to the perceived problem in the pricing of spare parts."

Two, I do not see, from a practical standpoint, where the various legislative proposals will cure the systems problems which led to this perception of the problem in the pricing of spare parts.

And three, we are afraid action is being taken before the perceived problem has been fully understood and addressed.

Some cite the problem as being one of spare parts price grouping, some as a problem with a faulty procurement system, and some as just improper implementation.

If we are to issue sweeping changes, then we need to spend more time looking at the problem. By legislative request, DOD is studying the problem plus each of the services is conducting their own independent analyses.

We question if we should not wait to see what these various studies yield before we enact legislation having the wrong thrust.

Gentlemen, the company I am representing here today does not survive by selling nuts, bolts, allen wrenches, et cetera, but it does survive as the maker of high technology, proprietary components—and without protection of these proprietary rights, we cannot exist as the responsive and innovative company upon which the major system contractors have been able to rely.

I am honored to be here today. I thank you for this time and will answer any questions or if there is further data required, we will be more than glad to furnish it.

[The prepared statement of R. John Chapel follows:]

PREPARED STATEMENT OF SUNDSTRAND CORP., BY R. JOHN CHAPEL, JR.

Mr. Chairman, and members of the Armed Services Committee, I am John Chapel, Director, Business Planning for the Sundstrand Advanced Technology Group, a unit of Sundstrand Corporation, Rockford, Illinois.

On behalf of Sundstrand, it is my privilege to present to you today our views on the various pieces of legislation having an impact on our corporation's proprietary data rights.

As a producer of a diversity of proprietary component systems, we believe that the passage of this proposed legislation would have a detrimental impact on our corporate viability as a long term supplier to the United States—that this same impact will be felt by the many other companies similar to us—and by our suppliers.

I do not intend to discuss in detail the specific language contained in any of the bills under consideration, as all of our time is limited. I would however like to spend the time you have granted to me to discuss how we see the conceptual issues and to explain to you how we see these issues affecting us and other suppliers.

In the defense marketplace, and in particular in the aerospace segment, one finds beginning at the first or second subcontractor tier, a group of suppliers who typically supply very similar products to both the public and private sectors. Typically this sales mix between public and private sectors will be about a 50/50 split.

I believe it is important for us today to get a clearer understanding of how these subcontractor and supplier levels do business. By this understanding, it is our hope that you will better understand the position we must take regarding the ownership of technical data.

Supporting the prime contractor in the development of any new system, we find these many subcontractors using base technology which has been developed over years, and applying some application engineering to this base technology to satisfy the current systems requirements. In this case, the contract usually only funds specific testing for performance verification.

In evaluating these programs the subcontractor will look at the investments that must be made to participate in the program and determine the investment potential looking at future sales and other applications. If the investment potential is not there he will divert his resources elsewhere. What we usually find is a system of continually building on proprietary technical rights. Often we find that the commercial market has paced the military market at this level, and if the subcontractor is forced to yield his proprietary rights, he may be forced to change his business approach and concentrate his newer technology towards the commercial market, and only use older technology in situations where he loses these rights.

Defining a specific time limit for the release of technical data is to us unacceptable. It is unacceptable because a time limit on proprietary rights will vary from weapon system to weapon system, supplier to supplier, and even component to component. What is suitable for the electronics industry will not be suitable for the makers of rotating machinery. What is suitable for a missile system will not be suitable for the manufacturer of rations.

I recently spoke to some of our manufacturing operations people and asked them how long it took us to develop some of our proprietary processes, how long have we been using them, and how long will they last. I would like to give you two specific examples:

1. Electron Beam Welding on some critical parts we supply took us ten (10) years to develop. We have been using the process since 1969 and see it going on in the future as long as we manufacture that type of part.

2. Diffusion Bonding of two materials in a critical part took eight (8) years to develop and has been in use since 1967, and again, we see it going on into the future.

For years we contractors have lived with and abided by the rights and data requirements set forth by first ASPR, then DAR, and now FAR. We find in these provisions, properly implemented, the capability for the Government to accomplish substantially all aspects of what is contained in the proposed legislation. But most importantly we find in these regulations recognition of specific circumstances with resultant fairness in regards to recognition and protection of contractors' proprietary technical data rights. We do not want to see legislation enacted which makes it impossible for us to survive as a viable supplier.

Prior to today, I have spent considerable time talking to the Small Business Committee of the Senate regarding legislation they were proposing. The core of my conversation has been to define technical data as that data which was specified and directly funded as a line items of performance in the contract. This definition then does not call for an interpretation of the phrase "developed at private expense."

I am here to present three concerns Sundstrand has regarding this proposed legislation. We believe some of the provisions contained in some of the legislation are an "over-kill" to the perceived problem in the pricing of spare parts. Two—I do not see, from a practical standpoint, where the various legislative proposals will cure the systems problems which led to this perception of the problem in the pricing of spare parts. And three, we are afraid action is being taken before the perceived problem has been fully understood and addressed. Some cite the problem as being one of spare parts price grouping, some as a problem with a faulty procurement system, and some as just improper implementation.

If we are to issue sweeping changes then we need to spend more time looking at the problem. By legislative request, DOD is studying the problem plus each of the services is conducting their own independent analyses. We question if we should not wait to see what these various studies yield before we enact legislation having the wrong thrust.

Gentlemen, the company I am representing here today does not survive by selling nuts, bolts, allen wrenches, etc., but it does survive as the maker of high technology, proprietary components—and without protection these proprietary rights we cannot exist, as the responsive and innovative company upon which the major system contractors have been able to rely.

I am honored to be here today, and thank you for your time.

Senator DIXON. Mr. Chairman, I think we concluded with me. I wonder if I may proceed in view of that on the proprietary question.

Senator QUAYLE. Certainly.

Senator DIXON. I am very much interested, Mr. Chapel, in your testimony because, as you know, your company is a great company in my State and I have the highest regard for all the folks in that organization.

Now, the testimony that you have given before this committee I would like to clarify in some respects the things you said.

You have seen S. 2489 with all of the changes that have been made prior to markup in the Small Business Committee, have you not?

Mr. CHAPEL. That is correct, I have.

Senator DIXON. You were in the audience this morning when I made my remarks concerning my expressed intention to offer an amendment to this bill, either in this committee or eventually on the floor that will clarify by the employment of three little words the further ongoing interest of your folks in these proprietary rights.

You are aware of that?

Mr. CHAPEL. And we were more than pleased to hear that.

Senator DIXON. Do I understand that the testimony you have given here regarding these proprietary rights would be more directed to S. 2571 and S. 2572 which have time limits on the protection of those proprietary rights as distinguished from S. 2489 which does not?

Mr. CHAPEL. With the bills that are currently written and including your statement of this morning offering the amendment, we would prefer S. 2489.

As you are aware and as our chairman of our board has communicated, we really feel legislation is not required because the current regulations if properly implemented, and I stress the properly implemented, do meet the intent of some of your concerns.

Senator DIXON. You are saying you would prefer to have no legislation at all?

I am sure people at the subcommittee meeting understand that. The bills cover a lot of other subject matters, the breakout question, the qualified products list and things of that kind.

But narrowing it down for this purpose to the technical data question and proprietary interest therein, you have no problem with my statement made during the committee meeting that it is now a voluntary acquisition question between the company and the Government?

We are not forcing you to give up any proprietary data under S. 2489 as it is now constituted?

Mr. CHAPEL. We do prefer that it be voluntary. We do not accept the provision that it be compulsory.

Senator DIXON. You understand it is not compulsory under S. 2489?

I want the record clear on that. There could have been argument about language in the bill I originally introduced. There might even have been an argument under the original S. 2489 before markup, but I think with the words I intend to offer as an amendment, all reasonable people, and hopefully all lawyers, will agree there is no quarrel about the fact that we are not forcing you to give up proprietary data.

Is that established as fact now?

Mr. CHAPEL. Senator, I agree with you totally. There is no forcing. As I have mentioned, the Small Business Committee knows when I get back into the earlier segment of your bill where it does talk about the substantial weight during the proposal phase, I question the words "substantial weight."

I do agree it is strictly voluntary and we do believe it should be that way.

On many of our products we have given up the rights on those products where they have been funded and paid for by the Government. We do, though, very firmly state that when we have paid for the development of those products, no, we do not want to give up the rights.

Senator DIXON. I will yield the rest of my time and not use all of it in view of the accommodating nature of the Chair in yielding to me.

This is a matter that has been under discussion for a long time. As I say, the bill covers many subjects, but I wanted to resolve finally that all folks agree, whether you want legislation or don't want legislation, that the current language employed in S. 2489, particularly with the amendment I expect to offer, will not constitute an area of adversary relationship on the language between various business groups and the members of this committee.

Mr. CHAPEL. I would concur with you on that.

Senator DIXON. I thank you for that.

Senator QUAYLE. I would like to follow up on Senator Dixon's point.

As I understand it, Mr. Chapel, your preference for S. 2489, is the way it is currently written since there is not a stated time certain when technical data rights have to be given to the Government; is that correct?

Mr. CHAPEL. That is one of the reasons. There are other provisions in S. 2571 and S. 2572 I object to, but we are firmly opposed to any time limit.

Senator QUAYLE. Is that true for Mr. Adams?

I thought I heard that you preferred the S. 2572 language.

Mr. ADAMS. I say where the bills address the same subject. For example, where two of the bills say the Defense Department should come up with the plan and implement that plan. We prefer the language in S. 2572.

I am not saying we prefer one bill over the other. We think the Small Business Committee has done an outstanding job in correcting some of the problems that were originally present in S. 2489.

We do not object to most of the provisions of S. 2489, we don't object to most of the provisions of S. 2572.

Our primary concern is the subject of data rights. We have some concern with respect to the subject of this source identification.

We don't really object to providing source information. We are concerned that this requirement for identification of sources can get carried away. When you start having to identify sources of subcomponents of commercial components, and so on, there ought to be a reasonable limitation of how much source information is enough.

We would like to see an exemption from those marketing requirements when you get to the commercial items as the components. We really don't think that the spare parts problem has been a problem involving commercial products, period.

We don't really believe it has been a problem involving proprietary data. But we share primarily the concerns with respect to the mandatory licensing and time limits.

If I might expand on that a little bit, I think that you all must realize than when you are talking about obligating a contractor to give up a property right which is what a trade secret is, that you are in fact exercising one of the most powerful Government powers around and that is the power of eminent domain.

No one has really talked about the question of when should a contractor be required to give up his property in the context of an eminent domain taking, which is really what you are doing.

What we are talking about is requiring or exercising the eminent domain power merely for the purpose of possibly saving a buck or two by creating competition. We don't know what it is going to cost to buy the rights and we don't know what we are going to save, if anything, when we do exercise that power.

You are really talking about taking property rights even over the passage of time or by mandatory sale or by mandatory license. We don't think you should be doing that.

Senator DIXON. But I worry about this. I hate to interrupt the response to the question.

Again I don't think S. 2489 does that.

Mr. ADAMS. S. 2489 does not require mandatory licensing or time limits.

Senator QUAYLE. Both are satisifed in S. 2489.

Senator DIXON. Negotiate that between the contractor and Government on an arm's-length basis.

Mr. ADAMS. It does raise the problem indirectly in this "substantial weight for evaluation factors."

Senator DIXON. I concur with what Senator Levin indicated this morning where he said you might have three of them. Two might be willing to give up their proprietary interest in the technical data and the third might not.

But if the one that didn't want to have the best product for the least amount of money, I presume the Government in its good wisdom would go ahead and buy from that particular company.

I thought your case this morning was a valid one. It is only that you would take it into consideration.

You don't object to that, do you?

Mr. ADAMS. No; we do not object to taking it into consideration. I agree completely with Senator Levin's illustration this morning.

My concern is that it will not be necessarily implemented that way by the time it gets to the contracting officer in the field who has not had the benefit of the experience and wisdom of Senator Levin.

You are talking about someone giving subsstantial weight as to how many pieces of data this contractor is giving to me and we are concerned that substantial weight will be a determining factor when it should not be.

That is why we suggest the clarification in the wording of those provisions. Perhaps that can be clarified in the report, I am not sure.

What we are really concerned about is the mandatory sale, mandatory licensing, and time limits. That is probably the biggest thing we have. Within that area we are certainly more concerned about items which have a commercial marketplace than items which are merely used for governmental purposes.

Now, you have to recognize there are a lot of dual use kinds of products. The dual use product is the major problem area when you start talking about technology overseas and export controls. We know there is a lot of thought being given to that problem in Congress.

I don't see anybody giving thought to the same problem here. When it becomes public disclosure, you have proprietary information acquired by time limit by our adversaries. That problem is not being addressed at all.

I am really saying we have the DOD study that Congress has been asking for, being done. We have Congress about to initiate other studies. We have the Defense Department doing their thing. We have the Office of Federal Procurement Policy that really ought to have a role in development of data rights policy for procurement that has not been heard from at all.

We have all these other areas where work is going on. It is the wrong time to do this.

Now, if we had some evidence that proprietary data rights as opposed to the management of proprietary data was the thing that was driving the price of claw hammers up $400 apiece, I could understand your concern. But we don't have any evidence of that at all.

The question of trade secrets and proprietary data does not apply when you are talking about products, the design and manufacturer of which can be ascertained by looking at them. That is not even a proper subject matter of trade secrets or proprietary data.

We have a law developed in the regulations for a period of 20 years. We are seeing those regulations, new proposals and deviations, and so forth, to those regulations being issued almost daily by the Air Force, General Weiss, and Admiral Sansone, and so forth, as everyone tried out new approaches.

What we are about to do is place into statute a series of rules that have not had the opportunity of the experience to be generated by the test programs that are going on. It is just the wrong time.

Senator QUAYLE. Didn't General Weiss this morning say that 29 percent of those people that had a particular problem identified proprietary rights in technical data?

Senator LEVIN. He used 21 percent.

Mr. ADAMS. He used one figure and another figure. I have not seen the basis for either figure.

Senator QUAYLE. Twenty-one or twenty-nine, take your pick.

Mr. ADAMS. I have 21 percent of noncompetitive procurement and competitive procurement is 50 percent.

In order to get to the figure, I have to multiply the two percentages and it goes way down. When Mr. Gordon talks about 3 percent, he is talking about a different topic than Senator Levin is talking about.

I don't know what topic General Weiss is talking about, but I do know the DOD study report that came out says 4 percent. The

AFMAG report says 8 percent. You have to look behind the percentages.

Senator **Quayle**. Whether 8 or 4 percent, when you narrow things down, then it comes out to 21 or 29 percent being the proprietary rights issue.

Mr. **Adams**. I don't mean to say that you are necessarily wrong, sir, but 21 percent of 8 percent is even lower and that is not the way you do the arithmetic.

What we are really saying is the AFMAG report is correct. The problem we are dealing with is small volume, low value items secured noncompetitively, because we have not planned for it, we don't know how many we will need eventually. We have not pulled the data together to do it with. We have not managed the program.

We have the small tip of the triangle in their report as to what the problem is. When you have the example of the claw hammers and allen wrenches, you are not talking about trade secret information, you are not talking about proprietary rights at all.

Now, I will agree with you immediately that any time we have a situation where a contractor is able to say to the Government, "You may not buy this from anyone but me because I designed it at my own expense and I made the investment in it and, therefore, you must buy it from me," that is an anticompetitive situation.

Senator **Quayle**. What should we do in a case like that?

Mr. **Adams**. I think you ought to applaud, I think you ought to be happy because here is a contractor who has taken his own money and invested it and come up with a product that the Government needs.

To say that I am going to take that away from you in 5 years, 7 years, 3 years, or whatever, or force it out of you in negotiations because it is a substantial factor in deciding who gets the award, to take those rights away from him under those conditions because you might save a buck, I am telling you, in my opinion, that is an improper exercise of the use of eminent domain power and that is what you are talking about.

Senator **Quayle**. What about funding a development contract, so that the Government could have the technology if in DOD's mind this will not breach national security? In the long run it could enhance competition by providing technical data.

Mr. **Adams**. You are in a development situation, things that the Government has paid for fully funded as development items.

Senator **Quayle**. There is no dispute on that.

I am talking about a situation where you have a manufacturer for justified reasons restricting rights to his data. He says, "I am not going to give it to you and you will have to buy my product and if you don't want to do that, take your business elsewhere."

Now, the Government is in a position of saying we need that particular widget and perhaps to enhance competition, we are going to have to try to have a development program of our own so that we can develop the technology because we don't think it will violate any national security and, therefore, in the long run we will be able to have more competition.

Would you have a problem with anything like that?

Mr. **Adams**. No; if the Government says OK, you take your rights, go home and I will develop it on my own, that is fine. That is another way to spend money. There is nothing wrong with that. There is nothing wrong with taking a product delivered by a contractor with proprietary data and reverse engineering it, if you can do that, because that overcomes any proprietary rights that the contractor has also.

These techniques are already in the regulations. They already do those things. They already have regs that say in order to have competition when we run into limited rights, we go to the contractor to sell it to us.

There is a whole range of opportunities in between and Mr. Gordon referred to them, in between this idea of limited rights and unlimited rights. There is a whole range of possibilities.

I will give you one real quick because I had a client who came to me who said:

> This is what I wanted to do, but I couldn't do it. I wanted to give the Government a license to my proprietary information and I want to let the Government use that information to create competition, but I don't want the guy who wins that competition to be able to use my data to compete with me in the commercial market.
>
> I am going to preserve my commercial marketplace, but I will let him use it for Governmental competition purposes, but I don't want to give it to the Government to let him set up my competitors in the commercial market.

Also, I had the same contractor who said, look, they are being reasonable, they are willing to do it that way, and when they give my drawing to a potential competitor they are willing to say that he can only use it to sell to the Government and not compete with me in the commercial market.

Now, what I want is an opportunity to include in that license agreement a provision that says when the Government has the subsequent competition, I will be able to be part of it and the contracting officer says: "No, I cannot agree to let you be part of any further competition because we have these set-aside programs and you are too big."

So, what the contractor does is give the Government his data in order to go out of the business and lose his market completely. It is a very serious subject.

All of the answers are not in. The answers are not necessarily limited rights and unlimited rights and they are certainly not mandatory licenses, mandatory sales, and time limits.

Mr. CHAPEL. May I interject a couple points?

Senator QUAYLE. Yes.

Mr. CHAPEL. First, in the case where the item is proprietary, whenever we have to price those items, they are always supported with cost and pricing data, always, whether we are pricing to a prime or whether we are pricing to a procuring base. So, there is information given to whoever is buying it as to what our actual cost is to manufacture this item.

Second, when we manufacture systems, we are not saying the entire system is proprietary. We are saying parts of it are proprietary.

For 17 years now we have had an agreement with Oklahoma City on breakout. We will sit down with them and we break out the item, we will break out the nuts, bolts, and screws, and those items which are not proprietary. They have the right to purchase from whomever they want those items.

If the units are proprietary, we hold the rights to them and we want to continue to hold the rights. You have a problem when you start using these other vendors. Currently we see legislation affecting warranties.

If you use that vendor's part in our system, we cannot warranty our item. There is no way we can stand behind that unit and if it is a critical item for an airplane, if it is expensive, and airplanes are expensive, we cannot warranty it if it fails.

So, you have a dual problem when you use other vendors' parts in a system where we have not had the opportunity to approve his manufacturing system.

We spend a lot of time developing vendors. We go out and work with them on quality. We spend a lot of time with their engineering and help with their engineering department. So, we know what we are getting when we put it in our system and we are willing to back that system. Using someone else's parts make it very difficult.

One thing which has not been addressed for we are talking about it in the area of time limits, what do we do about patents? Patents carry for 17 years.

Bernie was talking this morning of 60 months. He has never yet clarified how he is going to get around the patentable items. There are lots of problems in there.

We, ourselves, do not mind competing with anybody in the country or anybody in the world, our product against their product. We refuse to compete our product against our product. That is a totally different situation where we have to give him the processes and the design that we spent years and spent a lot of money developing.

We are not going to compete against him because he did not have to spend the money or the overhead to develop those items. That is a problem you must face in what you are trying to do.

You are going to create machine shops and all they are going to do is manufacture. Who is going to do the R&D? Who is going to invent the new product? Because if all we are doing is inventing it and giving it to someone else to manufacture, we cannot afford to stay in business.

Senator QUAYLE. Senator Jepsen.

Senator JEPSEN. I am sorry I missed this morning's session. I had to chair the joint economic hearing on the Federal Reserve Board which is also of interest to a lot of people today.

I will be brief. The two gentlemen that have just testified, with regard to basically most of the things they have said, I would say they said in moderation. I don't think it is proper for the Government to insist in bidding or innuendo or any other way that technical data rights be turned over to them. I think it is dangerous, dangerous to our national security.

The genius and creativity which we Yankees have developed over the years have been developed because of our private sector economic principles which foster individual initiative and reward for risk in investment, but not to take it away from you once you do it.

The story about the little red hen will take care of that. I don't think we ought to be tinkering around and fix something which is not broken. The Government has done too much of that already.

I will just state as a member of this committee on this particular subject, I want the record to show where I stand initially on it and how strongly I feel about it.

Certainly as a bottom line, if there is going to be any data rights provisions whatsoever, I believe there ought to be a determination to evaluate whether the Government directly funded the development. That is the only way the Government can reach out and say we will take it away from you.

If they financed it totally or partially, then I think there is reason for negotiation to come to an understanding as to data rights and make it a part of a contract or purchase.

The Federal Government indirectly provides any funds to industry just as any private person who buys an automobile contributes to the development of the automobile.

To impose data restrictions on private industry, there should be direct funding by the Federal Government of the development from which the technical data arose.

Has this issue been clarified during this hearing? Has this particular point been discussed?

Senator QUAYLE. It was discussed generally. Before you came in, both of these gentlemen testified that they had no objection to the bill before us, S. 2489.

Mr. ADAMS. It is hard to say which of the three bills you favor when they all touch the same subject to a certain extent.

With respect to data rights, we don't want any legislation whatsoever. If there has to be some, S. 2489 is probably better because it doesn't have these mandatory features in it.

Senator DIXON. I don't think I have any problem with what either of you have testified to.

You prefer no language concerning proprietary data rights or proprietary interests in technical data. You prefer there be no language, but if there is language, you don't want any kind of a mandatory language causing you to lose that interest over a period of time or else forcing you to sell it to the Government.

You want an opportunity to negotiate at arms length concerning those and, as I understand it, you take exception to the one word substantial, a pretty large exception to that on line 8 of page 3, I take it, as well, which is a thing we have to resolve.

Mr. CHAPEL. The reason for substantial comes down to a contracting officer in the field. Your definition of substantial and his definition may be totally different.

I would like to add to the definition and your definition of technical data the words "directly funded." I think that is the key because if the contractor is directly funded, I don't believe the contractors will argue as to who owns the data rights. The Government owns the data rights.

If it is not funded, the contractor owns the data right.

Senator DIXON. I think it is clear what their position is, Mr. Chairman.

Are you finished, Senator Jepsen?

Senator JEPSEN. That is what I was saying.

Senator QUAYLE. Senator Levin.

Senator LEVIN. There is a waiver provision in there, national interest or of the cost-benefit analysis indicates, either one of them, that you should not be seeking the technical data through negotiation.

So, there is that exception provision for the reasons that Senator Jepsen has indicated.

The use of the words "eminent domain" startled me a bit.

Mr. **Adams**. I had hoped it would because I don't think anybody had considered that is what you are doing.

Senator **Levin**. I believe there should be some changes, by the way, in these bills. There are a few places where they overlap. Maybe they touch different subjects. But we should amend, in my opinion, these bills, all three of them in a number of instances.

One of them is in the area of proprietary, certainly where there is a commercially available product. I think that is a very different issue from the product which is not commercially available.

In terms of eminent domain, though, it is not really, in my opinion, an appropriate application of the term because we are negotiating with somebody to sell something to the Government. The person is perfectly free not to sell that product.

In eminent domain you bring the force of the Government on someone's property and say we want it, whether you agree to it or not, we are taking it.

Whereas here the private party must agree to it. There is pressure in the market. Obviously, there is commercial pressure, the person could say: "Gee whiz, this is my business and I would love to sell to you." It is different from the Government saying we are taking the property, like it or not.

You ought to find a different way of phrasing the point. There is some economic incentive to sell to the Government, obviously, but that is very different from the law imposing the requirement that you transfer through eminent domain.

Now then, the question comes, When should we insist that a company turn over to us certain technical data as a condition of buying from that company? When should we insist on it? That becomes the question, it seems to me.

My answer is sometimes we should and sometimes we shouldn't. It depends.

Mr. **Adams**. My answer would be probably there is a point at which you should. Probably for mobilization or surge capability in time of war, but not necessarily just to save the theoretical buck that might be saved in the event of competition.

Senator **Levin**. We do already insist in many instances on technical data on proprietary data. We negotiate right now for that data.

By definition you agree that at times it is appropriate that the Government insist through negotiation that we obtain proprietary rights to certain technical data.

Mr. **Adams**. The thing that we are concerned about is that because of the economic choice that is available, these bills will in fact drive people out of the marketplace.

Senator **Levin**. I understand. That is a legitimate concern. I don't think we ought to be insisting on technical data when we are not going to use it.

No. 1, it is expensive. If we are not going to use it, there is no use insisting on it. I don't think we ought to insist on it when it is going to stop people from being creative and investing in R&D.

My only point is that there is nothing in principle wrong with it. It is in practice where it may be overused.

Would you agree with that?

Mr. ADAMS. Yes, I would.

Senator LEVIN. Right now we use it at times. The question is should we use it more?

You say, well, maybe you should and maybe you shouldn't but don't force the use of it through statute, leave us flexibility.

I tend to agree with you we should leave flexibility. The most important thing we ought to do is consider it. That to me is the one thing we really ought to do, is tell our purchasing people that for heaven's sake, consider it in deciding which contractor to use.

If one says he will give up these rights in 5 years, another one says he will never give them up, and another says 20 years, that should be a factor in your decision. Just consider it.

I don't know whether we should give substantial weight to it, by the way. I am not sure that adjective is the correct one. I think the appropriate adjective is no adjective at all, but simply say give consideration.

I am not sure the word substantial should be in it because the other factors might be more substantial like price and quality. I think there is agreement on that. We should give some weight to it.

The next question comes, Should we require that the producer tell us what his intention is or should we leave that voluntary?

Now, that is the difference in this one particular provision between the Dixon bill and my bill. We have only one little provision in the bills that touch each other only in a few places, but in this area that is the difference, as I know you understand it.

The bill that Senator Dixon introduced, and, by the way, which I cosponsored, which is the best proof that it is totally consistent with my bill, being on both, that Senator Dixon's bill says in the event that a contractor in a discretionary way offers this information, then it will be given weight.

In other words, if a contractor says I am going to waive my proprietary claims after *x* number of years, the purchasing officer must give weight to that along with these other factors.

Whereas our bill says in the absence of a waiver—we do provide for waiver—that we must obtain from each of the bidders a statement as to what their claims are.

Now, that is what the difference is in these bills on one point where they touch.

There are a couple other points where they touch.

By the way, I am not so sure that the answer is clear one way or another. All I am clear on is that it is not eminent domain because there is no force, that we should give weight to it when it is offered—that much I am clear on, when it is offered, discretionary weight, for heaven's sake, consider it.

I think probably we in noncommercial life ought to encourage people to offer it some way or other so that we can consider proprietary claims we make down the road.

Having said all that, I agree we don't want to eliminate creativity, investment, stopping research and investment. The question is, Do we take the next little step?

Mr. **Chapel**. May I comment on that, Senator?

One of the problems you have on the offering of the data rights of the beginning of the program is that we are proposing a new job today. The hardware has not been designed. It is difficult for us to tell you what data rights you can have on that job and what data rights you can't because we don't know what we are going to use to satisfy the performance of the contract.

An alternate way might be, and it currently exists in the regulations, is to use the breakout procedure. You get the contractor to agree that upon the design of the unit or its satisfactory first article inspection, that he will agree to sit down and perform breakout of the item.

By breakout, of course, we would then go through it part by part, those that are proprietary will be identified, those that aren't are identified and for those that are proprietary and the Government wishes to purchase the rights to, you can enter into negotiation with the contractor for those rights.

If it is a new development program, it is difficult to identify what you can sell at the time you propose because you don't know what the system will be.

We point out that is a difficulty in several of the bills.

Senator **Levin**. Of course, you lose a lot of leverage, obviously, if you wait until later on in the process. The more you know when you decide to whom you will give the contract, the better off you are.

If you have three bidders, I would want to know as much as I could. I would use every leverage I have as early as I could in the process. Why can't you run the Government as a business?

The answer is sometimes you can and sometimes you can't. There are some things where we ought to use some business sense. In one area we are dealing with three contractors and we want to promote competition, we want to do as much as we possibly can to give to that person.

One of the things is competition, guarantee of competition for as many components of that item as possible down the road. One way to do that is to get estimates from three people on how much of it will be proprietary claims.

Up front you don't know all the proprietary claims, but a lot of times you do. A lot of times the contractor knows exactly where they are going to get the components from and they can tell you pretty well up front what proprietary claims are going to be made.

My time is up. I want to thank the witnesses for their testimony. It has been helpful.

I may not agree with all the characterizations particularly, but I think in general we have to respect the goal that they are after in terms of protecting legitimate proprietary claims and I think they ought to respect what we are after which is to encourage competition and reduce the proprietary claims wherever we can unless we are going to thereby reduce the creativity and research and development and willingness to invest.

I think we kind of go after it from a different perspective. We are trying to get as much as we can for our clients, the taxpayers. You folks are trying to get as much as you can for your clients and you should.

Both are legitimate. I think we can work out most of the differences. By the way, I don't see the differences at all as being insuperable.

I am glad there is agreement on a number of these bills. I think it is helpful.

Senator **Quayle**. Senator Dixon.

Senator **Dixon**. Mr. Chairman, I want to share my expression of support for this hearing and the value to it that has been made by my friend from Michigan.

I think the whole hearing today has been very informative and from this many things can be done to further resolve difficulties that we have in this current legislation that is under consideration by the committee.

Before I ask you a question or two pertaining to a specific subject matter, I wonder if I can go back to the drawing board for a minute to make this point, Mr. Chairman.

It is again apparent in this hearing today we are spending an awful lot of time on proprietary interests in technical data. As we have done in prior hearings in the Small Business Committee, I would again make the point that is only one section of the bill.

It happens to be the view of this particular Senator it is not even the most important section of the bill from the overall concept of what we are trying to do here.

There are several other things like qualified products list question and the question of the procurement breakout centers and things of that kind that I think are more important in the long run in saving money for the taxpayers.

I wonder if you gentlemen share that view of mine?

We are not talking about the big question in this bill. It is a big question to your client, but it is not the biggest thing in this bill from the standpoint of the overall good we hope to accomplish by the passage of this legislation.

Mr. **Chapel**. To reply on the QPL, increasing the number of people on the QPL, basically I am not in disagreement with it. I mentioned before I don't know if five is the correct number as was indicated this morning.

Normally we look at two or more as being adequate competition. The only objection I have there and I look at that from a businessman's standpoint, I don't think the Government should pay for the person to be qualified.

I think the person should pay to be qualified, himself, the same as the other people did who are on that list. I think that makes unfair competition.

Senator **Dixon**. But you have no problem, do you, with my statement that as an example, I don't want to lose the provisions of this bill that relate to this subject matter and I don't expect that we will because I think we have pretty well resolved the problem, but if you took the whole section out of the bill, you still have a bill that addresses a good deal of important subject matters concerning procurement practices by various military agencies.

Mr. **Adams**. We agree with that, Mr. Dixon. We gave you, I think, 27 pages of comments and we tried to do it by section analysis of each of the bills. We didn't quite do that in one case.

I tried to emphasize early on that we support many of the provisions. From the industry side, looking at a lot of those other provisions, I think we have to tend to agree with what Mr. Gordon said that a lot of those provisions go to the management of the Defense Department.

Consequently, there is not all that much interest in industry in commenting on it. We share the concern. If you have two people, why should the Government pay for three more to qualify. Two is competition, that is enough. What more are you going to get out of the last three guys you spent all this money on?

Whether or not the technical advisers to the breakout representatives are on the payroll of the Defense Department or Small Business Administration, I can't say, we don't care, but it does not engender a lot of interest in people that really does not affect them to help to write legislation.

You should care that those are qualified people and what they are paid for on the right payroll and there is a very, very fine line, I think, that you have to be very much aware of.

We have in the past as an industry association expressed objections to—I don't want to overstate the case—I don't want to be quite as judicious as Senator Jepsen gave me credit for earlier, but we have so many gadflies around.

We said before we didn't care that much about competition advocates responsible for nothing and to no one but creating goals and making havoc for the people who are trying to get a job done.

Competiton advocates are there, we accept the concept of increasing competition, we support competition. They are already there in practice anyway.

Maybe you need the legislation or maybe you don't. Breakout representatives are in the same category. Here is a guy who has no responsibility whatsoever for the accomplishment of the Defense Department mission. Here is the legislation saying this man will be there, he will attend all your meetings, you have to give him that support, this support, and that support, but he is only an adviser.

Consequently, we have drawn this very fine line about who has responsibility for the job and who is just there to help you. I won't go into all the jokes about who is going to help whom.

Senator DIXON. I think you will agree my point is a valid one, there is a lot in the bill without this section. Once you get to this section, I think we resolve the conflict if there was one because there was a conflict created before I got in the process about liquidated damages. That is out of the window.

We resolved the conflict about mandatory acquisition. There is no eminent domain feature and if you want to use that terminology, and I am a lawyer myself and I share your concern, anyway it isn't in this bill.

We are down to the question of what weight you give these proprietary interest and other interests in the acquisition process or the procurement process by the Government and I want to resolve that one little word. We had three little words. I resolved that in your favor.

Now I want to get to the one little word. Let us do that on page 3. We say on line 6: "In any competitive solicitation for the award of any development contract for a major system, the following are accorded substantial weight as evaluation factors," and there was, I think, some testimony either by the two of you or testimony throughout the day concerning the terminology "substantial."

I want to first point out then we go on to say in lines 9 through 11, "Giving due consideration to the purposes for which the system is being procured and the technology to achieve the systems' required capabilities."

I would first argue that we substantially modify the word "substantial" and give the Government and everyone concerned with the process a lot of leeway to characterize what is done as employing things that take away from the substantial question so far as the proprietary interest is concerned.

I want to say to you that I would be interested in hearing from you about what you think would be better terminology there because I think I share the view of the chairman and Senator Levin and others who have suggested here they wanted to have some weight in the appropriate circumstances where it ought to have weight, but that we don't want it to be a characterization in this legislation such that a procurement officer would feel that it is the major thing that he or she ought to consider.

That is a point I want to make for the record as part of the tracks on this bill should there ever be some time in the future where an evaluation of that terminology would be required from the record of the proceedings.

Mr. **CHAPEL**. May I suggest instead of using the words "substantial weight," you use the word "consideration."

You and I could sit down across the table and live with those words and operate with them. My concern comes from dealing with people in the field and through the experience that I see, I do not want a contracting officer trying to interpret what those words mean.

If you just say you will give consideration, that then leaves it up to the contracting officer, he can evaluate the system, he knows whether that product is very critical to the system's operation, then he may not give quite as much consideration because now he wants the technical aspect of the product.

If it is an item that is more of a standard item, then having the technical rights, he can give that higher consideration.

Senator **DIXON**. Neither of you here are saying that we ought not to say that the procurement situation in the hypothetical case, that if the contracting officer gets two products at the same price that are equal in performance capability that you ought not to take into consideration the proprietary right that the Government would acquire with one product vis-a-vis another product?

Mr. **ADAMS**. Once you get to the question, whether or not you get to the extent of proprietary right, you have gone too far. You ought to be concerned that the product that you are buying is capable of being maintained and supported in the future.

You ought to be concerned that in maintaining and supporting that product in the future, I am going to be able to do it at reasonable cost.

Now, very often you don't need proprietary data to do that. You just go a little bit too far.

Now, I will accept Senator Levin's comment that it is not technically eminent domain because there is no compulsion, you can walk away, you don't have to do it, you can negotiate it. But when the economic pressure gets to be great enough, it is the same thing.

When you talk about the multibillion-dollar procurement, and so forth, there is no company that can walk away from it.

Senator DIXON. Remember the chairman talking about going out again this morning, not the retrospective question or the prospective question, but on some existing contracting out again for more acquisition?

Mr. ADAMS. I will identify two sources to you because I licensed both of them and I am getting royalties, no matter which one sells to you. There is a wide range of alternatives between limited and unlimited rights.

I will qualify two guys for you, I will license two people. I will comply with the antitrust laws. I won't——

Senator DIXON. I don't want to interrupt, but my time is up.

I want to conclude by saying this. I don't think there is a lot of difference between what you are saying and what we are saying except in your perception at your end of the table as distinguished from ours.

I would say there are certainly clear cases I could see or you could see where if you acquire proprietary interest on the one hand and not on the other, all other things being equal, that you surely ought to acquire the proprietary interests for the protection of the taxpayers when you go out again.

You would not quarrel with that, would you?

Mr. ADAMS. I doubt it, no.

Senator DIXON. OK. That is all I want to establish.

I thank the Chair.

Senator QUAYLE. I think from listening to the discussion and also the input from our witnesses that there is in all probability general agreement on how we ought to proceed. I think there are some modifications we ought to consider and take a look at.

Senator DIXON. I do, too.

Senator QUAYLE. We certainly will get into the meat of it next Tuesday.

Senator DIXON. If I can give a good company in my State three little words, I think it is entirely possible I can give them another.

Senator QUAYLE. You are awfully generous. We will see how it comes out on Tuesday.

Thank you very much.

Mr. CHAPEL. Thank you.

Senator QUAYLE. Our final witnesses are Sally Douglas, representing the National Federation of Independent Business, and Christopher Cross, representing the Chamber of Commerce of the United States.

STATEMENT OF SALLY DOUGLAS, REPRESENTING THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Ms. DOUGLAS. Thank you, Mr. Chairman.

My name is Sally Douglas. I am manager of research for the National Federation of Independent Business, an organization which represents 570,000 small and independently owned businesses across the Nation.

I am here today to testify to our continued strong support for S. 2489, support which we had originally given to Senator Dixon in his bill, S. 1730, from which we now have S. 2489.

We thank you again, Mr. Dixon, for your efforts in this area.

Senator DIXON. Thank you for your support.

Ms. DOUGLAS. I won't belabor the point. My testimony will be going into the record so I don't think I need to reiterate the concerns of small business point by point, problem by problem. I think that we are all aware of the fact that there are some considerable procedural impediments, for lack of a better term, for small businesses trying to enter the Federal marketplace encounter.

It is a frustrating situation and members of NFIB continue to report virtually the same problems over and over again. Those are the problems that S. 2489 addresses to a significant degree.

We are, by and large, very pleased with the deliberations of the Small Business Committee, with the language that has come from the markup with one exception which I would like to address quickly, but first, what I would like to say is that the approach to S. 2489 is, in our view, practical and sensible. It is a systematic approach, if you will, rather than superimposing specific requirements and ignoring real problems with the system.

The bill has incorporated requirements for competition within the system, starting with the procurement planning process. At that point I would like to address quickly the point of the little word "substantial."

It is a word that is very important to NFIB, the small business community. In our opinion, it does not give the implication that these issues that we have just been addressing with the previous witnesses will be the major factor in award of a contract, but substantial weight does imply that these issues are to be given equal, appropriate, whatever other word, a little stronger than consideration, vis-a-vis some of the factors that are already included and accorded substantial weight.

We think that is fair. This is an important point in opening up the system to more competitive procurement. The one objection, if you will, to what has come from the markup in the Small Business Committee which we would like to address, and unfortunately could not get in the hearing room this morning, so I don't know whether it was discussed, was the issue of liquidated damages.

Senator DIXON. Both the Chair and I apologize for that. This is the only room we could get and we have never had a crowd like this before. I am embarrassed you could not get in.

Ms. DOUGLAS. I was in the anteroom. I was told there was one seat, but be that as it may, it sort of shows what we are trying to accomplish here is popular from one perspective or another.

Senator DIXON. If the chairman had known you could not have gotten in this morning, I am sure we would have arranged it.

Ms. DOUGLAS. I am pleased to see some people are taking an interest. I think it generates good conversation from both sides.

Liquidated damages has been eliminated. We think that is a mistake. In terms of our support, we were trying for some type of mechanism, not necessarily liquidated damages, but some type of deterrent.

It represents an up front understanding between the Government and the contractor that if you play fair, we will play fair and if you don't, you will be penalized for it.

I would ask the task force to continue to pay some attention to the issue of deterrence. We think it would give the enforcement of this bill a much better chance and without enforcement, it really doesn't matter what we try to legislate. If it doesn't work, it doesn't work.

The only other thing I would like to address is in listening to the comments of the previous witnesses, I am reminded of testimony that was delivered about a month and a half ago before the House Armed Services hearing on H.R. 5064 which is similar to one of Senator Levin's bills.

Chairman Nichols got into a dialog with some representatives of prime contractors who maintained there was not legislation of this sort needed, that essentially the Department and the prime contractors would make good-faith efforts, that we needed to study the problem, leave us alone, we can handle it, in effect.

The chairman reminded them that this sort of issue keeps cropping up on a 10-year basis. When he first came to the House of Representatives, he sat in on a very similar hearing 10 years ago and was told the same thing and no legislative action was taken.

I would simply like to throw that into the record as a reminder that there is concern from people including the small business community that it is time to try to do something.

It may not be a perfect solution, but it is better to have something in place with which to work.

Senator DIXON. You weren't here this morning. I don't even know that it came up this morning, but I would hope you understand that it was the position of this Senator as the principal sponsor of S. 1730 and the two principal sponsors of this bill that I would have liked to have kept the question of liquidated damages, but yielded to those who felt it would be a mutual question with Government responding with liquidated damages to the contract when the Government was at fault so that unlike the original S. 1730, it would be a mutual thing.

The consensus was the Small Business Committee—I want to be up front about this so that you understand my problem—was that there was lack of support for liquidated damages, that if that was contained in the bill, that in the view of a great many, the bill was fatally flawed.

I am new to the Senate, I came here the same time as my distinguished colleague who served in the House before he came here, but I used to be in the Legislature of Illinois for 20 years and my experience is that you make the accommodations necessary to get a bill.

Sometimes you give up something even if you think it is a good idea because the whole bill is worth more. That was the point I was trying to make with the people who testified just before you.

We spent more time on the proprietary interest question so far as technical data is concerned on this whole bill than the rest of the bill by two or threefold, yet I don't consider it the most important question in the bill.

I just want to clarify that I take note of your feelings. I want you to know I was aware of that. In the process of the markup I did all I could to address your position. I was in the minority on that.

Sometimes one has to accept in this business that most of the legislative process is given to accommodation and compromise. The product you see here is the result of it so far and there may be some more compromise before we get a bill.

I hope you believe it is in the interest of small businesses generally that you represent in the country to get a bill.

Ms. DOUGLAS. Absolutely.

Senator DIXON. That is the only point I have.

Ms. DOUGLAS. I would like to add that the proprietary data rights question is a serious question, but it is only one of many things in the bill.

Senator DIXON. I thank you for saying that.

[The prepared statement of Ms. Douglas follows:]

PREPARED STATEMENT OF SALLY L. DOUGLAS, MANAGER OF RESEARCH, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. Chairman, my name is Sally Douglas, and I am Manager of Research for the National Federation of Independent Business (NFIB), an organization which represents 570,000 small and independently owned businesses across the nation. I am here today to testify to our strong support for S. 2489, the Small Business Competition Enhancement Act of 1984.

As members have told us, you don't have to be in the procurement game very long to draw a very strong conclusion that frequently, unless an invitation for bid is specifically set aside for small business, small business is specifically excluded.

Consider the following problems encountered by small firms in attempting to bid on contracts:

Competitive bidding is often precluded because the agency will not supply drawings or other necessary data, even when the data are available.

The agency can control who is permitted to bid by delaying sending data packages until it is too late for the unwanted company to bid.

Small quantities preclude anyone but a tooled source from bidding successfully. Quote packages can often be prepared for a small number of units even though the procuring agency knows additional units will soon be required.

Under the Freedom of Information Act, prior procurement history of an item can be requested. Some agencies provide this information routinely, others try to establish road blocks. At least one agency charges for the data.

Procurements are frequently restricted to previously qualified sources (often only one or two companies). If a company is not "qualified" and wants to become "qualified," it must fight the system to do so. The company must procure drawings—some times only the entry of a formal protest will dislodge the information—manufacture the part, and have the agency agree to test or check the item. If the company is bidding, the cost of inspecting and testing is added to the bid, so frequently the bid becomes non-competitive. Sometimes the tests themselves are arbitrary and the cost increased so these will not have to be performed. Even when the buyer wants the tests done, if the agency engineers are too busy or do not have funds, the qualification process is not accomplished.

Frequently the government effectively permits, or even sets aside, a procurement for bids from small business, then excludes the small business by using restrictive notes.

Not enough information of a specific nature is included in many Commerce Business Daily notices on advertised procurements for firms to make an intelligent decision on whether to request bid packages.

If a buyer chooses not to identify additional sources for an item, he/she can simply put a restrictive note in the *CBD* advertisement. There seems to be no supervisory control over the use of such notes, nor is there a consistent pattern from one buying agency to another. In the case of an NFIB member, this meant that while the member made a part for the F4 for the Navy, he was not able to get the data package for the Air Force version of the part. Since there were some slight differences between the two parts, he was excluded from bidding on the Air Force part. After he initiated a formal "Protest," the bid was accepted. Even though he was low bidder, he was ruled "unqualified."

These are just some of the obstacles small businesses encounter when trying to participate in Federal procurement. NFIB is therefore particularly pleased to see the introduction of S. 2489, the Small Business Competition Enhancement Act of 1984. If this bill is enacted, a valuable service will have been performed both to small businesses which contract with the Federal government and to small firms which have wanted to but have been stymied by numerous procedural impediments.

S. 2489 is a practical, sensible approach to reform of the procurement system. Rather than superimposing requirements on the system—which is rather like treating the symptoms and ignoring the disease—S. 2489 builds requirements for competition within the system, starting with the procurement planning process. Many of the practices and procedures agencies have used to block small business participation are revised or eliminated by this bill.

The bill establishes a series of procedural requirements for agencies to follow in the planning of future procurements covering the awarding of design and production contracts so as to promote competition in the procurements of "spare parts"; restricts the use of prequalification requirements to those situations the agency can justify, according to specified standards, and establishes requirements to expand the number of qualified sources or qualified products, thereby expanding the industrial base. Granting authority to provide assistance to small firms seeking qualification is a particularly attractive feature, provided that we ensure the availability of funds to render such assistance.

S. 2489 also contains provisions which will eliminate a major impediment to competitive procurements, that being the current difficulty in identifying the actual manufacturer of a component. Under S. 2489, not only is the prime contractor prohibited from limiting direct purchase of a component by the government from a subcontractor if that component had previously been furnished to the contractor without restriction; the contractor must also document the identity of the actual manufacturer of a component and maintain a list of subcontractors and supplies. The government has an unrestricted right to this information. Without these provisions, successful breakouts for competitive procurements will be nearly impossible.

Requirements for timely notice of forthcoming procurements and sufficient information with which to make a sound business decision to bid or not to bid are also covered in this bill and should alleviate significant problems for small firms.

Access to technical data is another key feature of S. 2489 and a critical point in ensuring that new sources for products needed by the government have all the necessary tools with which to compete fairly and efficiently. Predetermination of the respective rights of the Government and the contractor or subcontractor regarding technical data deliverable under the contract is critical. While there are legitimate considerations regarding overburdening of agency contracting personnel and protecting proprietary rights of contractors, a proper, effective system of checks and balances must be established to ensure that agency personnel perform responsibly in contracting on a competitive, cost-effective basis. Similar checks and balances must be in operation to protect the legitimate data rights of the contractor without allowing price gouging or barriers erected against responsible competitors.

Lest we seem unduly harsh, let me say that proprietary data rights is a legitimate concern among business owners, particularly within the extremely innovative small business sector. If there are indeed legitimate proprietary interests to be protected, the contractor should easily be able to make the case. But too often proprietary rights have been a buzzword for abuse, and data which were developed at government expense have been lumped into a package with legitimate proprietary data and withheld. We therefore support the language in Section 5 of S. 2489, requiring contractors to justify, in advance of delivery, claims to data which will be delivered with restrictions on the government's rights, as well as the language which gives the government recourse against proprietary claims which the contractor cannot validate.

The language contained in the original draft was substantially modified during the Small Business Committee markup of the bill. In our opinion, the elimination of a significant deterrent is a mistake. We believe the contractor should be subject to payment of liquidated damages or some other form of penalty if found to have improperly asserted proprietary rights, and we ask the members of the Task Force to pay particular attention to this issue. The contractor should also reimburse the government for the cost of technical evaluation and audit of the asserted limitation, as well as the government's fees and other expenses incurred in challenging the asserted limitations, if the certification is found not to be substantially justified, unless special circumstances would make such awards unjust.

Similarly, we support the language requiring the establishment of separate contract payment lines relating to the delivery of technical data under the contract and authorizing the withholding of payments for failure to make timely deliveries of acceptable data. Such withholding of payment is authorized in current regulations but rarely if ever implemented. Codification would strengthen the government's hand considerably in ensuring that complete, accurate data packages are delivered on a timely basis.

S. 2489 would also require the assignment by SBA of a breakout PCR to each major procurement center as well as assignment by each agency's Director of Small and Disadvantaged Business Utilization of four small business technical advisors to complement the PCR. In essence, a partnership is created between SBA and the procuring agencies to promote competition. Technical competence is ensured by the requirement that well qualified, technically trained persons familiar with the particular needs of the procuring agency are chosen to advise the PCR. At least one of these advisors must be an accredited engineer.

SBA and GAO reports indicate the Breakout Procurement Center Representatives have already contributed significant cost savings to the government by identifying spare parts contracts for competitive bidding. This program, now operating as a pilot, merits expansion.

The Certificate of Competency (COC) program, which has been in existence since the Korean War and which the Small Business Administration has administered since 1953, is given a significant boost in S. 2489. Arbitrary administrative decisions to restrict COC coverage is prohibited, the exception being that the small business itself can forego review. In addition, the right to a COC review is extended to small firms which the government has disapproved as subcontractors. NFIB strongly supports these provisions.

These are just a few of the items contained in S. 2489. Absence of mention of any other items does not indicate opposition. We merely highlight some of the reforms which are of particular interest. To reiterate, NFIB strongly supports S. 2489 and will work for its enactment.

Senator QUAYLE. Mr. Cross.

STATEMENT OF CHRISTOPHER T. CROSS, REPRESENTING THE CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. CROSS. I am Christopher Cross, executive vice president of University Research Corp., appearing today on behalf of the Chamber of Commerce of the United States.

The chamber supports S. 2489 and commends this committee for their extensive efforts to find workable solution to the legislation matter concerns of the small business community without unnecessarily disrupting the extremely complex procurement process.

The chamber's decision to support S. 2489 likewise is the result of many months of study and debate about how best to solve the spare parts procurement problem.

As this committee is well aware, spare parts procurement—especially in the Department of Defense—has received much public attention recently. It is a subject that has polarized the business community.

Prime contractors and subcontractors, service industries and manufacturers, large corporations and smaller firms all have vested interests in Federal procurement policies. And, as might be expected, sometimes those interests conflict.

I think it is important to note here that the chamber established a task force, a working group, to address the issue of spare parts procurement last December. This group which consists of members of the Council on Procurement Policy and Council on Small Business has determined that S. 2489 is an approach that the chamber can support.

Its recommendations have been reaffirmed through appropriate chamber policy channels.

In an earlier appearance before the Small Business Committee we made some technical suggestions which were incorporated in the bill and the markup in that committee.

Our written statement contains an explanation of both those parts of the bill which we support, those things which we are pleased not to see in the legislation which we think are perhaps not necessary to resolve here and does suggest some other areas that we think might need to be further considered in your own committee's consideration.

I would just like to mention three of them and then ask, Mr. Chairman, that our full statement be inserted in the record.

The three areas that we identify in our statement that we think may warrant some further consideration is, first, the time that is allowed the Department of Defense to implement its planning system. I believe the bill gives them through 1989 for that to happen.

I think, as the witnesses this morning from the Defense Department acknowledged, the biggest problem is their management of the system.

We would encourage both that the time period be shortened and that the Department be given the resources to enable them to get on top of the issue in a faster period of time.

Second, the bill does not appear to provide any rights of appeal in the case where a contracting officer determines that they are going to reveal proprietary data, trade secrets.

We would ask and suggest that there might be an appropriate mechanism put in for an appeal, a right for a court injunction or something of that sort, because there might be instances where through inadvertence, or whatever, a decision is made peremptorily and there is not really an opportunity for negotiation.

Last, a point which has been mentioned this morning, the bill calls for five firms to be qualified.

We think that may be too many, that there are probably thin markets, if you will, where there is not the economic viability for it there and if you have three firms, it is probably sufficient to enable you to obtain the best sort of opportunities for cost reduction.

As I mentioned, these are spelled out in more detail as well as our views on the bill.

With that, I will be happy to conclude and will be glad to answer any questions.

Senator **Quayle**. Your entire statement will be put in the record.

[The prepared statement of Mr. Cross follows:]

PREPARED STATEMENT BY CHRISTOPHER T. CROSS

I am Christopher T. Cross, Executive Vice President of University Research Corporation, appearing here today on behalf of the Chamber of Commerce of the United States. I am accompanied by Ellen B. Brown, Chamber Regulatory Affairs Attorney and staff executive to the Chamber's Council on Procurement Policy.

The Chamber represents about 200,000 large and small business firms in this country, and has a strong interest in procurement by the Federal Government, not only in the interests of our members who participate in the Government market, but also in the interests of promoting economy and efficiency in government to minimize the tax burden for all our members.

The Chamber supports S. 2489, and commends this Committee and the Committee on Small Business for their extensive efforts to find a workable solution to the legitimate concerns of the small business community without unnecessarily disrupting the extremely complex procurement process.

This bill is the product of more than six months of hearings, research and study of the obstacles to competition that have excluded many small companies from selling replacement parts for major systems directly to the government. The Chamber's decision to endorse S. 2489 likewise is the result of many months of study and debate about how best to solve the spare parts procurement problem.

As this Committee is well aware, spare parts procurement—especially in the Department of Defense—has received much public attention recently. It is a subject that has polarized the business community. Prime contractors and subcontractors, service industries and manufacturers, large corporations and smaller firms all have vested interests in federal procurement policies. And, as might be expected, sometimes those interests conflict.

In order to best address the broad range of interests our members bring to this issue, the Chamber established last December a working group to examine various approaches to spare parts procurement reform. This group, consisting of members of the Chamber's Council of Small Business and Council on Procurement Policy, recently determined that S. 2489 was an approach that the Chamber should support. Their recommendation was affirmed through appropriate Chamber policy channels. The working group made some technical suggestions for improving the legislation; most of them were included in the bill reported by the Senate Small Business Committee. Our remaining technical concerns are discussed below in this testimony.

The spare parts procurement problems is not a single problem, but a series of overlapping and interrelated problems within the extremely complex and sophisticated federal procurement process. These problems can be divided into two major areas: First, little attention is given to future replacement and service needs of a major system during its planning and design phases. As a result, technical data needed to manufacture replacement parts, rights to that data, and knowledge of potential sources for replacement parts are unavailable or too costly and timely to locate when the need arises. Often the government has no choice but to go back to the prime contractor for these parts. The additional handling and the lack of competition involved in dealing through the prime contractor add unnecessarily to the government's costs and deny qualified companies the opportunity to provide a comparable product at a better price.

S. 2489 addresses this problem by integrating into the planning and design cycle of a major system, contract requirements that should make it easier to award competitively the spare parts contracts that will be needed during the system's service life.

The bill encourages planning ahead by providing incentives for major contractors to use components that are commercially available or currently available within the government supply system, or components for which technical data is available. In addition, the bill calls for prime contractors to specify technical data rights and to price separately options to purchase restricted data for parts that will need to be replaced during the life of the major system.

Second, existing procurement practices and procedures in many cases especially burden small businesses trying to do business with the government and discourage new competitors from bidding on federal contracts. S. 2489 calls for several specific, systematic reforms that seek to remove obstacles to competition without compromising the quality of products and services the government buys. By establishing procedures agencies must follow when using prequalification requirements, the bill would compel agencies to make clear the terms of qualifying a product before they are implemented, thereby putting an end to much of the confusion and uncertainty many small companies face when trying to get their products approved for government purchase.

Other provisions seek to increase the number of qualified sources for a product, and to provide more useful information about the government's purchasing needs in Commerce Business Daily notices.

S. 2489 addresses the problem of technical data management by requiring purchasing agencies to specify more clearly the contractor's responsibilities with regard to delivery of needed technical data and by requiring agencies to develop and implement plans to effectively manage the data they receive.

The bill seeks to deter contractors from overrestricting the government's right to use technical data for the purposes of competition by establishing procedures for prompt and effective review of proprietary claims.

Finally, S. 2489 would place Breakout Procurement Center Representatives (BPCRs), employed by the Small Business Administration, in each major federal procurement center. The BPCRs would identify spare parts that are currently procured on a noncompetitive basis and designate, or "break out," these items for competition. A pilot program using BPCRs at three Air Logistics Centers of the Air Force Logistics Command saved over $35 million in FY 1983 alone. Implementation of such a program government-wide should produce immediate and tangible benefits in the form of more competition and lower prices.

The BPCR program should be extremely effective in increasing competition and opening the federal procurement process to more qualified small companies over the short term. The other provisions of S. 2489, taken as a whole, provide a solid beginning to untangle a complicated and difficult series of problems that over many years have had the effect of excluding small businesses from selling their products to the government and artificially raising the cost of many items purchased by government agencies.

The U.S. Chamber commends this Committee for its speedy consideration of this important legislation. We urge you to report favorably S. 2489 for consideration by the full Senate as quickly as possible.

As I mentioned earlier, the Chamber has some technical suggestions we believe would improve implementation of the stated goals of this legislation:

Section 4(n)(3) provides additional assistance to small businesses seeking qualification where there is a limited number of existing qualified companies. The bill uses a floor of "fewer than five." Although the intent is to increase competition, government and taxpayers should not have to bear the expense of qualifying additional companies unless there are only two qualified companies available. Further, the overall financial burden of the agency will substantially increase without necessarily providing the commensurate benefit of obtaining a product of appropriate quality. It is likely that, where five companies exist in a market that will support only two or three, higher costs will result since product volume required for economy and efficency will never be realized.

The issue of proprietary rights to technical data has given rise to considerable controversy. Underlying much of the current discussion is the assumption that if the government had unlimited rights to use all data it obtains, competition in the purchase of spare parts could be significantly increased. To accomplish this results, several proposals have emerged to establish a fixed time within which the contractor must surrender its technical data rights.

This approach is peremptory and coercive and would deter the most innovative contractors from participating in defense procurement. The overall result would be a shrinking of the industrial base and a loss of valuable technological innovation. More important, contractors—particularly small firms—may suffer damage from a release of trade secrets. In many cases, trade secrets represent the market value of a firm and premature disclosure could be disastrous. Further, foreign companies would be given an advantage through the trade secrets of U.S. industry at the expense of U.S. defense interests.

The Chamber supports the approach taken in S. 2489 with respect to rights in technical data because it addresses the problem without imposing arbitrary and artificial time limits on data rights. It accomplishes this by focusing on technical data management and establishing procedures for validating proprietary data restrictions.

The Chamber urges that no time limit policy be added to S. 2489, and that the technical data provisions in S. 2489, with the modifications suggested below, be reported favorably by this Committee.

Section 6(b) requires agencies to develop and implement a comprehensive and intergrated plan for the management of the vast amounts of technical data received under major systems contracts. The government's ability to manage and account for technical data in its possession is essential to carrying out the goals of this legislation. Yet, this section allows agencies until 1989 or beyond to implement their technical data management plans. By requiring the necessary management systems to be in place as soon as possible, S. 2489 could make clear the priority nature of installing such systems. Therefore, section 6(b)(2) should be amended to require that implementation be completed no later than three years after the management plan has been developed.

Section 7 provides for review of the validity of a contractor's or subcontractor's restriction, requires the contractor or subcontractor to submit a justification for the restriction, and permits the contracting officer to remove any restriction if the contractor or subcontractor fails to submit "any justification." This means that the government can remove restrictive legends for lack of a justification within a prescribed number of days. The contractor has neither a way to enjoin the release of the data to third parties nor a forum to account for his failure to submit justification. Once such data is released publicly, it is no longer protected, and damages may be an inadequate remedy. We believe this legislation should provide a right of appeal or an opportunity to seek injunctive relief pending a final decision on the validity of the restriction. Further, section 7(p)(1) should be amended to limit the period for review so that contractors will not be asked to furnish information not otherwise required by law to be retained.

Finally, it is important to note that S. 4289 provides an exception for computer software and data relating to products, components or processes developed at private expense or developed solely at private expense and offered for sale to the general public. Contractors must not be required to sell, license, grant or transfer rights in technical data and computer software relating to commercial products. Rights to such data and software are generally not necessary for the government to obtain reasonable prices for these products. In the past, this has not been a problem in spare parts acquisition relating to commercial products. However, this exception is necessary to promote continued private investment in advanced products and technology in the interest of national economy. Companies' right to data relating to their commercial products should not be jeopardized merely because they may sell such products to the government. We urge this Committee to preserve this exception.

Thank you for the opportunity to present our views and again, we urge the Committee to report favorably S. 2489 for consideration by the full Senate.

Senator QUAYLE. Thank you.

Mr. Cross, the two panels before you both brought up this issue and I would like you to comment.

They said that they didn't think it was fair for new small businesses that were going to get on the qualified products list to have the Government in fact pay for the testing, that this was, in effect, a subsidy and was showing favoritism to one business over another.

Mr. CROSS. I think it is the policy position of the chamber that we feel it is important to enhance competition and that the price of that competition may be that you have to make an investment in getting some firms qualified.

I think that is an issue that has to be addressed. The problem of firms having perhaps expended their funds before to get vested in it is a difficult one.

I think there is no real equity in that situation. I don't think there is any way to come out of this with everybody satisfied in that regard.

We would favor taking those steps that are necessary to get more bidders qualified and if that involved assisting in testing, that should be done.

Senator QUAYLE. You think it might be the stated policy of the chamber that the government should subsidize to enhance competition?

I find it a rather curious position of the chamber. If that is the policy of the chamber, I certainly think a lot of people might want to know about that, that we really need to have more Government subsidies to create competiton, that we can't really do it out there in a free market.

Is that what you are saying?

Mr. CROSS. I think the issue in this bill on spare parts procurement are so special that I certainly would not attempt to generalize that beyond this and would hope the Senator would not put me in position of trying to make more than that generalization this afternoon.

Senator QUAYLE. You can see how one can draw that conclusion. We have the timing aspect.

One is go ahead and the Government pays. There is an equity question there aside from the competition.

Mr. CROSS. I acknowledge that there is. I don't know how you deal with that, Senator. You can't go back, I am sure, and recompense those firms that are qualified. You would never be able to isolate the cost, you would never be able to deal in terms of current dollars and all those other things that are necessary.

But if the view is to reduce spending by making more effective procurement decisions, then that investment will probably warrant and yield dividends which we would expect to see.

Senator QUAYLE. Therefore, before you make the decision, what you are saying is that there really has to be, for lack of a better word, a substantial emphasis on cost effectiveness of the whole procedure?

Mr. CROSS. On the whole procedure of qualifying bidders?

Senator QUAYLE. On qualified products lists, particularly when we get into retroactivity?

Mr. CROSS. Substantially appropriate, whatever term.

Senator QUAYLE. But cost effectiveness has to be the critical question?

Mr. CROSS. YES.

Senator QUAYLE. In your statement that you submitted, do you give some firsthand illustrations of companies that have had these problems, some clearcut examples where they have actually gone to the DOD or the prime contractor and said, "Hey, you know I can do this for less," and they say, "You are not on the qualified product list; therefore, you are not eligible."

Have you documented such cases as well?

Ms. DOUGLAS. When we testified before the Small Business Committee, Richard Ludwig, president of the Lavelle Aircraft Corp., testified on behalf of NFIB. He is a Government contractor.

From his personal experience, he has submitted both to the Small Business Committee and to myself numerous instances of personal encounters with the obstacles that we are trying to address in this bill.

In fact, he had testified at previous hearings on procurement paperwork and made some fairly broad suggestions which were incorporated in S. 2489.

Senator DIXON. He did a show and tell, showing parts that he did for so many times, less than the original.

Senator QUAYLE. Why was he excluded?

Ms. DOUGLAS. There is a specific example in the testimony before you in terms of a particular contract he was involved in where it was sort of a series of mishaps, if you will, where he was actually manufacturing a component for one of the services.

Another service came out with a solicitation for a very similar part and he couldn't get the data package in order to bid on it.

He issued a formal protest. They did send him the data package. He put together a bid package, sent it back to them. He was accredited as the low bidder and then he was told he couldn't get it because he was not on the qualified bidders list even though he was manufacturing virtually the same product for the other services.

That is just one example that he has provided to us.

Senator QUAYLE. Did he eventually get the contract?

Ms. DOUGLAS. No, not that one.

Senator DIXON. Some of the things to a person who has no technical understanding at all, it is just like little right angle pieces of metal. It does not impress me very much at all as things that ought to be on a qualified products list.

It would be valuable sometimes if more of us could actually see some of the things that have been on the qualified products list that are mighty simplistic in nature.

Senator QUAYLE. Maybe we ought to work to reverse it. If you manufacture simple items, maybe we should not require that they be on a qualified products lists.

Senator DIXON. One of the objectives this bill is attempting to do is to show that you must justify these items being on the qualified products list in the first instance.

Senator QUAYLE. I think we ought to have some exercise before they get on a list. An item has to be proven, it has to be technically sound. Otherwise, you wouldn't have to go through a lot of paperwork.

Ms. DOUGLAS. What S. 2489 is trying to establish is that there need to be standards, a set of standards so that everybody knows what we are playing by here.

A lot of times the small business owners will try to get in on a contract and they have absolutely no idea what is being required of them because nothing is actually down in writing.

What S. 2489 is trying to establish is to justify through the use of specific standards for products for bidders, whatever, but so that everybody knows what we are really dealing with, as to whether they can qualify vis-a-vis the standards before they start getting involved in the process and come up against these roadblocks.

Senator DIXON. I say to the Chair this bill would provide that before an agency may establish a new prequalification requirement, it must justify the need, specify the standard which a prospective contractor must meet in order to become qualified and provide an opportunity for a contractor to demonstrate its ability to meet those standards.

I just want to thank Sally Douglas from the National Federation of Independent Business, and Chris Cross from the Chamber of Commerce for their support in the Small Business Committee and in here and say to you both that we take to heart each thing you have said.

The various new suggestions you have made, I might say to Mr. Cross, will be immediately evaluated by staff here to see whether it is appropriate to incorporate them in the bill.

I do want to say to Ms. Douglas that I hope I have not given her the impression that I am going to back down on the idea of substantial altogether and accept any word supplied. We do want the proprietary interest question to have weight in the process.

We intend to see that this bill provides for it. You have heard all the testimony this afternoon.

Incidentally, we will make available to you the testimony from this morning. I will see that you get a copy of it. I am asking my aide right now to see to it that this morning's testimony when we get ours be Xeroxed so that you can have a copy of it.

Again, I want to reiterate my interest in obtaining a bill here. A good deal of the testimony here today was by folks who said we don't want a bill at all.

I think what the Chair, Senator Levin and Senator Jepsen, and all of us are saying is that we want a bill, a fair bill.

The bill will not have everything in it that everyone wants. But we hope it will be a reasonable bill that business can profit under and that the Government can usefully employ to protect the interest of the taxpayers.

I think that is a fair statement of what we are trying to do.

Mr. Chairman, I want to personally say to you I appreciate all the time you have spent here today. I have been advised by my aide I have to go to the floor right away, but I do say that I appreciate very much everything you have done.

Senator **Quayle**. Thank you for your contribution. This is basically your bill. So, we will be working with you to see what kind of accommodations we can make when we proceed to mark up next Tuesday.

With that, I thank the panel, and the meeting is adjourned.

[Whereupon, at 3:40 p.m., the task force adjourned.]

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